# ECONOMICS, ETHICS AND PUBLIC POLICY:

# THE CASE OF FAIR TRADING

A thesis submitted for the degree of Doctor of Philosophy of the Australian National University

by

Lee Edward Boldeman

December 1999

## Sub- rule 15(2) Statement

This thesis is the original work of the candidate except to the extent to which indebtedness to the works of other authors is acknowledged within the text and the footnotes. All sources that have been consciously used have been acknowledged.

Signed: 

## Preface and Acknowledgments

I should like to acknowledge the support and encouragement I have received from the members of my advisory panel and from a number of other people. I should like to thank Professor Pat Troy, firstly for his hospitality towards me when I first came to the ANU as a visitor in the Urban Research Unit in 1994. Pat subsequently encouraged my candidacy and, in time, agreed to be my formal supervisor. I have appreciated his support and encouragement throughout this journey. Special thanks is due to Dr Don Lamberton, a economist of extraordinary wide learning, who guided me through my studies in 1994 and subsequently. Don has been generous with his knowledge, time and books, and with his friendship. He has been a source of constant encouragement and stimulus. Professor Neutze, a member of my panel and my formal supervisor for a period, has also been very encouraging. I should especially like to acknowledge the generous support, encouragement, and friendship of the late Professor Peter Self. All the above were members of the then Urban Research Unit within the Research School of Social Sciences, ANU. From the support staff of that Unit I have received nothing but help and encouragement. I should also like to express my appreciation to the Australian National University more generally for the opportunity to embark on these studies.

I also owe a debt of gratitude to my close friend, Mr Ken Lees, who, while not an academic, is a man of deep learning, particularly in philosophy, and who first encouraged me to resume my studies. Mr Lees has made a significant contribution to my studies over the last five years as an adviser and sounding board. My friend, Dr Edwin Byford, theologian, physicist, and priest, has also been a source of constant encouragement and critical comment. Dr Evan Jones has also been generous with his comments and encouragement.

I am grateful also for the encouragement I have received from my wife, Vicki Boldeman, and our children and from my friends and colleagues within the Commonwealth Departments of Industry, Science and Technology and Communications, Information Technology and the Arts. Mr David Hull proofread the final document.

## Abstract

The value of the grand theories and the sacred rules advanced by economic elites in recent public policy debates is open to serious dispute. A more pragmatic, experimental, and eclectic approach to policy development is warranted, one that takes our traditions, our values, and the role of political compromise more seriously.

A recent major policy debate at the Commonwealth level, the Australian Fair Trading debate, extending over the last twenty-five years is examined. This debate culminated in the 1997 Reid Report, leading to substantial legislation regulating business activity against the trend of recent economic rhetoric. The history of this long debate illustrates the influence of a strong faith in 'the Market', and an associated discounting of the role of governments, in constraining and shaping public policy development. This policy discussion, like others, was impoverished by a failure to understand that the basic precondition for an effective capitalist system is a dynamic and effective civil society.

What was involved in that debate about new Commonwealth regulation of unfair business practices were fundamental questions of the relationship between economics, ethics and the law raised. In particular it points to the use of economic efficiency as the dominant evaluative methodology and language in contemporary policy debates. The evaluation of these issues needs to be seen in the context of deeper debates about the nature of law, contract, and the epistemological status of economics as a scientific and moral discourse. These in turn need to be seen in the context of discourse on the nature of social order.

The account points to the moral nature of the social order, in which the control of greed is a central concern. The disciplining of that greed is a prerequisite to any complex exchange economy. Ignoring the vulnerability of those systems, neo-classical economic analysis has effectively taken social order for granted in its search for an ahistorical, individualistic, mechanistic and naturalistic account of the economic system. It claims self-interest as the fundamental force driving economic and social activity providing a pseudo-scientific justification for greed and self-aggrandisement. More subtly, it promotes acquisitiveness, undermining relationships, as the basis of individual identity. It assumes and promotes contracts as the basis of those relationships and social and political system.

This search is part of the Enlightenment's broader search for a naturalistic, individualistic, mechanistic, and universal account of our social system, divorced from any divine authority, and substituting Reason and Nature as the alternative sources of authority. That Enlightenment program has failed. Consequently, we now lack any generally accepted, satisfying justification for our moral values and of our social, political and economic arrangements.

The Enlightenment's natural law outlook was central to Locke's justification of his social contract theory, and remains central to contemporary neo-classical economic analysis and its use in public policy formulation. The thesis traces the close historical and intellectual relationship between social contact theory, the doctrine of freedom of contract in classical contract law, and neo-classical economics. It relates the erosion of the medieval concern for mutual obligations in economic life to these intellectual developments. The recovery of a concern for equity throughout the twentieth century has been associated with the breakdown of nineteenth century explanatory theories and in particular the classical contract theory.

There is no broad agreement on the foundations of our social system. Nevertheless, and in antagonism with the Enlightenment's anti-metaphysical aspirations, neo-classical economics now performs for contemporary policy elites the role of a static religion, justifying fundamental social and economic arrangements. In the case of the Fair Trading debate, however, these values, while they dominated the public discourse, did not prove decisive. Rather, it was a concern with fairness among backbench Liberals on the Reid Inquiry, the powerful influence of the small business lobby, and accidental political circumstances, that were decisive. Consequently, a powerful new and contingent impetus has been given to fairness in commercial dealings and to the judicial revival and extension of the equitable doctrine of unconscionability.

*CONTENTS*

# CHAPTER 1: OVERVIEW OF THE THESIS

This thesis disputes the value of the all encompassing grand theories and the seemingly sacred rules advanced by economic elites in recent public policy debates. Economics does not, and cannot, provide the overarching theory of social action. Nor is there an ideal form of social or economic organisation against which to measure our institutional and organisational arrangements. Rather, a more pragmatic, experimental, and eclectic approach to policy development, is warranted, an approach which takes our traditions, our values, and the role of political compromise more seriously.

Public policy debates in Australia, like those throughout the rest of the developed world, have been heavily influenced by 'economic rationalism'. This is an approach to public policy development characterised by a strong faith in markets and a suspicion of government, a position closely aligned with much contemporary economic theorising. Indeed, economists are highly influential in contemporary public policy debates, an influence based on their claimed technical expertise and the alleged robustness of their theories. Economists dominate civil service recruitment to policy positions in many countries, including Australia. Consequently, such views have largely colonised the senior levels of the Commonwealth Public Service, particularly in the coordinating departments. This influence was manifested in the policy choices that resulted in the substantial downsizing of the Commonwealth public service following the election of the Howard government in 1996 and its major program cuts in the name of fiscal responsibility.

The Fair Trading debate, a major policy debate at the Commonwealth level, extending over the last twenty-five years, is used in this account to illustrate the influence of economic rationalist thinking on recent public policy formulation. The Fair Trading debate culminated in the Reid Report in 1997, which in turn led to substantial amendments to the *Trade Practices Act 1974* to prohibit unfair business conduct: an outcome which ran against the trend of economic rationalist rhetoric. This outcome was largely the result of contingent circumstances, in that the responsible Minister, who opposed such regulations, lacked the political skills to deflect the pressures for change generated by small business. The Minister was forced to resign his portfolio after it was

shown that he had a serious conflict of interest between his private interests and his responsibilities for fair trading issues.

The Fair Trading debate was impoverished by a failure on the part of the major participants to appreciate that a dynamic and effective civil society is a precondition to an effective capitalist system. In such a system, the pursuit of individual and institutional choice and 'self-interest' is heavily constrained both by internalised moral codes, and by externally imposed social sanctions. Here, answers to these questions are sought in recent politico/economic history, placing them in the context of a larger and deeper debate about the law, particularly the law of contract, and the moral foundations of our society.

This examination of the Australian Fair Trading debate takes place against powerful currents in philosophical and moral discourse, currents that undermine the certainty of our knowledge and the foundations of our moral theorising. These currents are important because the Fair Trading debate raises fundamental questions about the relationship between our moral values, legal rules and the regulation of economic activity. Consequently, here, the Australian debate and the conceptual issues involved, are placed in their historical context, as such a historical context is necessary to a proper understanding of the debate. It will be found that certain crucial, but hidden underlying assumptions, are central to that debate. These assumptions are the autonomy of the economic system and the primacy of the economic over the social. They underlie claims made throughout the debate. These assumptions also underlie the development of the doctrine of freedom of contract, the central doctrinal objection to government regulation of unfair business conduct, a development that parallels the development of social contract ideas and relies on the same Natural Law Outlook.

The debate also provides a useful illustration of the entrenched power of economic methodologies and values as the dominant evaluative consideration used in contemporary policy debate. This influence is reflected in the use, throughout, of the rhetoric of classical contract law, developed in the nineteenth century under the influence of positivism and the classical economists, the contemporary rhetoric of minimum effective regulation, concerns about the impact on transaction costs, and theoretical arguments about economic efficiency. Against this, there was no

corresponding attempt on the part of the government to evaluate the costs of unfair business conduct. Consequently, the debate remained largely at the speculative level, although there were appeals to anecdotal evidence by the small business lobby. What is also evident is that it was a debate that could not be settled on the basis of current moral theories based on individualistic premises, which are incommensurable and incompatible, but could only be mediated by the political process. Indeed, it can also be seen as part of a broader and more basic political controversy that cannot be resolved using current theorising based on individualistic premises.

Contracts, broadly defined, and property rights are the central organising techniques of the market system. Indeed, the concept of contract is frequently used as the fundamental explanatory device in 'explaining' the social order. The doctrine of freedom of contract is central to the conceptual framework within which economics and economic rationalism operate. It was a doctrine that developed within the English common law tradition, a tradition which Australia inherited, under the influence of the Natural Law Outlook. The development and subsequent decline of the doctrine of freedom of contract is one of the major intellectual movements of modern times.

The development of the doctrine of freedom of contract, a development that parallels the development of social contract theory, followed the gradual breakdown of the medieval idea that people owed a wide range of duties to their feudal lord, other people, the Church and to God. Among those obligations was an obligation to behave justly in economic transactions. Thus the idea of a just price or wage was at the centre of medieval economic thought, even if the privileges of the medieval elite are now seen as exploitive. With the breakdown of these ideas, property holders, who had formerly been tenants of the crown, came to see themselves as owners, while ideas about the ownership also became more absolute. These changes made it easier for the propertied elite to see civil society as based on a social contract, not Divine Law. For both Hobbes and Locke, the primary function of the state was the maintenance and enforcement of rights of property and contract. Together with Smith's *The Wealth of Nations*, and the associated idea of a harmony of interests, these theorists provided the moral justification for the property and contract-based society of the eighteenth and nineteenth centuries.

There was a close connection between economic liberal ideas and the rule of law as it came to be understood after 1688. The value of individual freedom and free choice was closely connected with the idea that the law should be regular, certain, and subject to interpretation by 'independent' judges: thus the rule of law is, itself, a politically biased ideology. As the common law grew increasingly to recognise the generality of the binding nature of contracts, contracts began to be seen as being about promises, wills, and intentions and not about particular relationships or particular transactions.

But the common law was not the only tradition in English legal practice. Equity consisted originally of a body of rules and procedures that grew up separately from the common law, and was administered in different courts. These courts exercised a jurisdiction which did not override the common law but which remedied its imperfections. The Chancery tradition was one of regulation, protection and paternalism. The rationalisation of legal practice in the nineteenth century led to the common law and equity being merged and administered by a single set of courts. Thus the Chancery tradition was gradually eclipsed as the doctrine of freedom of contract gained ascendancy, though it was never completely abandoned. At the same time, the role of juries in determining contractual damages, with their bias in favour of the underdog, was also gradually whittled away. This rationalisation of the law and the associated whittling away of equity was influenced by a new positivist legal literature looking for legal principles based on rational first principles and by the ideas of the classical economists.

In addition, in the early decades of the eighteenth century, popularisers of economics began to propagate *laissez-faire* policies. These ideas may well have had more influences on judges and judge-made law than on the other organs of government. Nevertheless, the very heyday of the sanctity of contract was also the period in which the whole machinery of government was created in Britain virtually out of nothing. The growth of this machinery and its associated social legislation had a profound impact on the whole idea of a contract-based society. Thus, by the late nineteenth century the primacy of contract was under direct political attack in England. This change is perhaps most clearly marked with the passage of the *Sale of Goods Act 1893*, an act which was subsequently adopted virtually unchanged in every Australian State and Territory. Thus it is clear that, while the idea of freedom of contract as an absolute ideal gained

credibility and influence in the nineteenth century, it was eclipsed by the end of the century as the unjust consequences of reliance on this principle began to sink in.

In respect of the Commonwealth of Australia, this increasing willingness of governments to legislate to regulate commercial activity is reflected in general attempts to regulate restrictive trade practices such as in the *Australian Industries Preservation Act 1906*. This Commonwealth act and its successors were rendered ineffectual by conservative judicial interpretations, partly under the continuing influence of the doctrine of freedom of contract. It was not until the *Trade Practices Act 1974* that effective general Commonwealth legislation was directed against restrictive and unfair business practices, directly interfering with freedom of contract.

There were approximately eighteen major reports, or legislative proposals, dealing with proposals to amend the *Trade Practices Act 1974* to strengthen the regulation of unfair business practices. The most recent of these was a reference to the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee) in June 1996. This committee produced a bipartisan report, *Finding a balance Towards Fair Trading in Australia* in May 1997. The Committee concluded that concerns about unfair business conduct towards small business were justified and should be addressed urgently. To this end the Reid Committee made wide-ranging recommendations designed to induce behavioural change on the part of big business. They included proposals for separate strong franchising legislation and very strong amendment of the *Trade Practices Act 1974* to prohibit unfair business conduct. The strength and breadth of the Committee's recommendations came as a surprise to many observers as it ran directly counter to the rhetoric of deregulation surrounding recent public policy debate, including that contained in its own terms of reference.

The report trigged a debate in the media, recycling the positions that had been advanced over the previous twenty-five years. Political fate took a hand in these proceedings when the responsible Minister, who was opposed to the Committee's recommendations, was forced to resign for a breach of the Ministerial Code of Conduct. Finally the Government in September 1997 accepted the thrust of the bulk of the Reid Committee's recommendations, including greatly broadened unconscionable conduct provisions. Since the enactment of the amendments the Australian Competition and Consumer

Commission, which is responsible for the administration of the *Trade Practices Act 1974*, has actively sought to bring representative actions to test the extent of the new provisions. These changes further erode classical contract law, authorising the courts to examine a broad range of factual issues in contract disputes involving small business, involving both procedural and substantive issues, in a way inconsistent with the classical law. While the courts are still to react to the new legislation, there is a strong possibility that these legislative provisions, and in particular the requirement to act in good faith, will migrate to the common law.

The Australian Fair Trading debate also picked up the issues raised during the development of the doctrine of freedom of contract. This positivist doctrine came to full development in the last half of the nineteenth century; the creation of judges and thesis writers influenced by social contract ideas, classical economic thought and the associated ideology of voluntariness. This classical view of contract involved a process of abstraction, generalisation and systemisation in a vain attempt to create a unitary scientific theory of contract, free of moral valuations. Thus, it was part of the Enlightenment's attempt to separate the public from the private realm. Central to this concept was the idea that contracts arose from the will of parties and not as a result of public law. The classical view of contract relied on a Natural Law obligation to honour promises, a claim that the rule of law provided norms independent of politics and conceived of courts as rule enforcers rather than settlers of disputes. All of this involved a commitment to rigid mechanical decision rules that were to be implemented in a mechanical manner, a replica of the determinism of Newtonian physics. But this was an idea that could not be sustained: contracts are clearly enforced for reasons of public policy, and are sometimes not enforced for similar reasons. In any event, the refusal to inquire into the circumstances surrounding contracts, that was associated with classical contract law, is inconsistent with its own will theory of contract. The realisation of this fact has led to the replacement of the will theory by an objective theory and then, in the United States, at least, with a process of doctrinal disintegration. Adding to the confusion is the realisation that the grounds for equitable non-enforcement also do not fit under a unified doctrine. Thus, contract theory exhibits the same confusion that exists in moral philosophy. Nevertheless there is a growing recognition in common law countries of an obligation of good faith and a duty of care in contractual obligations. These developments are consistent with a relational view of contractual arrangements.

Throughout the Fair Trading debate there was an almost overwhelming deference to the concern for 'economic efficiency' over other values. Thus, justifications for regulatory action to deal with such unfair conduct have inevitably had to be couched in terms of 'economic efficiency benefits' and evaluated in these terms. Indeed, the issues of 'uncertainty in commercial arrangements' and 'freedom of contract' have been the most significant objections to stronger unfair trading laws. Nevertheless, none of the interest groups involved attempted any sophisticated analysis of the role of contract in the market system. While much was made of the danger of uncertainty in commercial dealings, many of the contracts involved provide the weaker party with little certainty about the environment that they faced. It seems unlikely that inexperienced small business people are engaged in a process of rationally allocating the risks associated with those relationships as claimed by neo-classical economics. In these circumstances, a sounder theoretical basis for describing contractual relationships is required, one that involves power as an important element. While the language of minimum government 'intervention' was heard frequently, no one attempted a positive justification of the continued application of state coercive power in support of the institution of contract. On the contrary, it was the small business groups who were seen as demanding government regulation and who had to justify that demand.

In regard to any broadening of the doctrine of unconscionability, it was argued that any change would involve the courts in the application of value judgements and that was undesirable. In particular, a rule was claimed to be preferable because it would promote consistency, predicability and uniformity in decision making. But no substantive argument was advanced to support the primacy of those values. It is questionable whether such a rule is defensible in the face of abundant evidence that has accumulated over the last century that the only possible rule, that contracts will always be enforced, has already been found wanting. It also involves a simplistic understanding of regulatory strategy, assuming that such a rule, is enforceable in practice. Given inequality in the distribution of financial resources, the expense and complexity of legal proceedings, and informational asymmetry, such an assumption appears heroic. In this context the idea of minimum and effective regulation might be said to be mutually inconsistent. Effective regulation relies ultimately on a comprehensive suite of

regulatory powers combined with the resources and the will necessary to back the use of those powers.

## THE UNDERLYING PERSPECTIVE

The Australian Fair Trading debate involved two key assumptions, the perceived autonomy of market institutions, and the primacy of the economic over the social. These assumptions underpin the excessive faith in markets that characterises economic rationalism. Consequently the analysis can begin by looking at these two key assumptions in the context of some key reminders about the nature of society and social order. This involves a recognition that people are social animals whose social relationships are central to their sense of identity. The individual requires a stable and coherent social environment in order to survive, to prosper and to develop. This recognition must lead to a rejection of any attempt to assign explanatory primacy to either the individual or to the group. Indeed, our earliest hominoid ancestors lived as members of social groups and the evolution of the human involved a complex process in which the organised hunting of large animals, life in organised social groups, and the making and use of tools were interconnected. The whole pattern evolved together. Thus, our biological nature is not prior to culture, but is expressed through, and moderated by, culture. The process of socialisation, the acquisition of this cultural knowledge, is a process of 'moralisation'. Indeed, human uniqueness consists of an ability to control our animality, through a system of discipline. It is the control of greed, broadly defined, which constitutes a principal achievement of culture over animality. And it is this system of social control, involving social norms, primary laws, and religious and ethical teachings, which makes complex organisation possible. The development of this system of social control has involved a long process of moral and social experimentation, to select ways of behaving that mitigates the war of all on all. This process of cultural development is not a once-for-all influence, but is ongoing.

It has long been recognised that the maintenance of the social order involves a moral struggle within individuals and between individuals. Contemporary Christian theology talks about humankind's 'torn condition' in referring to what has more traditionally been called original sin. This doctrine saw philosophical expression in Hobbes's war of

all on all, but secular discourse has largely forgotten this insight into the fragility of the social order.

The maintenance of social order involved the creation of moral institutions backed by coercion. Nevertheless, convention is society's strongest preservative against anarchy and the tyranny of all-pervading punitive and coercive law. Neither conventions, nor laws, can be reduced to rationality or, indeed, to any other form of optimising mechanism. While morality is often conceived of as a system of rules, moral development proceeds along two different paths giving rise to two different moral languages, a language of rights that justify separation and a language of responsibility that sustains relationships.

No dominant theory has emerged to explain the existence of social order and of our political and moral institutions. Indeed, the whole project seems to confuse the need to explain what happened with a desire to provide a theoretical or Euclidian justification for our moral judgements. While there are four dominant theoretical approaches to the social order problem - private interest, situational analysis, consensus and conflict approaches - there is no need to finally choose between these perspectives, as each can contribute to understanding.

While there has been extensive academic discussion of the relationship between the economic system and the social system dating back to Smith, most recent neo-classical economists have tended to neglect the dependency of the economic system on the social system. This neglect is implicit in the whole neo-classical research program which is committed to explanation in terms of methodological individualism, reductionism, instrumental rationality, the Newtonian metaphor, and self-interest as the fundamental social force. The consequence is that society is assumed to be a form of contract, an understanding has its roots in the whole Enlightenment program.

Nevertheless, this contemporary neglect of the relationship between the economic and social systems is surprising given the weight of earlier discussion. For example, Smith saw that the economic system depended on rules and institutions. Marx emphasised that the market consisted of social relationships, but saw the moral 'superstructure' of a society as adapted to its sociotechnical or economic 'substructure'. Weber saw

economic action as social, emphasising the autonomy of social orders, law, politics and religion. In his view, market exchange was exceptional, the most instrumental and calculating social action possible. Durkheim saw the division of labour as the principal vehicle for creating cohesion and solidarity in modern society, but with a structure of norms and regulations surrounding economic exchange and mading it possible. Polanyi takes up the same theme seeing the typical market as just one of many possible forms of organised exchange. He believed that a self-adjusting market could not exist for any length of time without destroying the human and natural substance of society. The later Hayek also makes clear that what he had called the 'spontaneous' order of the market was dependent on the system of abstract rules, deep-rooted convictions and moral rules, the product of civilisation and the institutional infrastructure of the economic system. Granovetter reminds us that economic institutions are socially constructed and that the pursuit of economic goals is accompanied by non-economic ones. North noted that complex impersonal exchange is the antithesis of the conditions under which cooperation arises from rational self-interest in game theory. Like Elster and Coleman, he concluded that rational self-interest can not explain human sociability.

It is concluded from that survey of views that the economy is a sub-system nested within a more encompassing social context, though this does not preclude the view that a process of mutual conditioning is involved. Thus, neither of the two fundamental assumptions underlying contemporary policy discourse, the autonomy of the market and the priority of the market over the social can be sustained. This involves a rejection of the reductionist and economic rationalist position that rational self-interest is the fundamental force sustaining society. It also involves a rejection of a social contract account of the social order.

In developing its argument further, our account points to the fact that a search for an unassailable basis for society has long been part of the Western political and philosophical tradition. This has involved a search for an ahistorical account, partly because an historical, evolutionary account was not fully available until the emergence of Darwinism in the nineteenth century. But it is also because, in our intellectual tradition, such an historical account is not seen as providing an adequate philosophical or scientific explanation.

The *polis* of classical Greece provided one such intellectual model, while St Thomas Acquinas provided another. These models provide an explanation in terms of some ultimate good or Divine purpose. What is important for this study is the fact that the medieval Aristotelian concept of man as a political and social being gradually broke down and this brought with it a need for a new explanation. This change was associated with the decline of the moral and secular authority of the Western Christian Church as a result of the Reformation and the religious and political strife that followed. The succeeding intellectual climate was defined by Deism and a distancing of God from human affairs. Consequently, a direct transcendental grounding of human affairs was no longer seen as providing an adequate explanation. Following the Enlightenment's rejection of Christianity's claim to an historical revelation, that was the source of truth and value, the asserted authority to teach on faith and morals passed from ecclesiastical authorities to political and moral philosophers, who assumed such an authority because of their special knowledge of the Truth and of Natural Laws. What remained in Deism as a remanent of God's presence in the world was the faculty of reason, the holiness of rationally. There was an associated belief that Natural Laws had been created to ensure human happiness. Consequently the discovery of, and obedience to, such Laws was essential to human happiness. The development of natural moral theory is implicit in such an approach. It was an approach that progressively divinised Nature and human Reason, providing a secular source of meaning and justification as comprehensive and as dogmatic as the religion it replaced.

This trend was also associated with the development of science and a desire to find a scientific and natural explanation of all phenomena. But in this era what was scientific was modelled on Galileo and Newton. Thus, Hobbes provided an explanation of the social and political order in which the pursuit of power and pleasure was the sociological equivalent of gravity. It was Hobbes, and then Locke, who created a new form of political theorising and who sowed the intellectual seeds of economic liberalism and ultimately economic rationalism. The breakdown of medieval ideas about social duties allowed ideas about property rights to become more absolute. Locke's theory, in which property rights were seen as being pre-social and a natural right based on Natural Law, served the interests of the propertied classes, and thus they came to see society as based on a social contract. With the power and economic interests of the social elite not

far from the surface it was a social contract in which the social obligations also associated with Natural law were soon overlooked and then forgotten.

However, by the time of the Scottish Enlightenment there was a greater awareness that the existence of individuals in society was problematic. In trying to deal with this problem, the same type of political and moral theorising, the natural law outlook that was found in Hobbes and Locke, continued to be used . Thus, for Smith, the concept of moral affections and natural sympathy provided the direct grounding that had previously been provided by God. Smith's account was also thoroughly Newtonian in that moral sentiment balanced the force of self-interest. Indeed, for Smith, this balance was the result of Divine providence, Smith acknowledging the influence of Stoic philosophers.

Civil society views under the Scottish Enlightenment's were directed against restricting reason to what we now call, following Max Weber, instrumental rationality. But the assumed unity of reason and moral sentiment began to unravel with David Hume. Indeed, for Hume, society was not founded to protect property rights. There was no social contract, nor was there any state of nature. The allegiance owed to the state and the obligation to perform contract were both based on self-interest. By the nineteenth century, the aspiration to create a science of morals and legislation became focussed on utilitarianism. It provided an alternative ahistorical 'scientific' account of moral and political theory also based on a mechanistic Newtonian model in a somewhat similar way to Locke. Thus Bentham, like his predecessors in the Enlightenment tradition, started from an understanding of human nature and tried to deduce all institutional and legal arrangements from that nature. But the attraction of utilitarianism was undermined by a refusal of most people to believe that ideas of pleasure and pain were the only source of human motives.

The social evolutionists of the late nineteenth century, the next theorists in this tradition, sought to provide an alternative account of the social and political order that was also both scientific and historical. In the process they abandoned the psychological reductionism that had characterised Hobbes and Locke and many subsequent theorists. In this social and political theorising, the uniformity of nature acquired a logical status and a numinous aura, which made it a substitute for the idea of God. Spencer, the most extreme of these theorists, was an evolutionary determinist who saw social competition

as part of the process of evolution. Thus competition and survival of the fittest were justified as a natural scientific law. Spencer was, therefore, an extreme defender of *laissez-faire* and of freedom of contract. Subsequently, it came to be realised that this form of evolutionary theorising justified any existing social and political system, and thus was thought wanting. It also foundered on a reluctance to derive an 'ought' from an 'is'.

In summary, with Hobbes and Locke we saw the beginnings of a new type of political and moral theorising which sought its ground in the natural world, individualism and a so-called scientific perspective. While these ideas do not make a coherent whole, they constitute the complex of ideas, the tradition, on which economic rationalism dogma depends. Thus with Locke we see property rights and contract used to explain the existence of society. With such theorists as Mandeville, Hume and Smith we see the gradual transformation of self-interest from being a source of moral failure to a source of public good, albeit moderated by a dash of sympathy for others, and by competition. And through the alchemy of the Newtonian metaphor, these naturalist justifications for self-interest were turned into a formal theory. And with Spencer the moderation was removed and we see an attempt to justify naked self-interest and the survival of the fittest. All these theoretical efforts shared Locke's attempt to privilege the language of natural science over other vocabularies, something that is characteristic of contemporary economic rationalism.

There has recently been a major revival in social contract theorising with Rawls and Nozick, who lie squarely within the above tradition. Indeed, the idea of social relationships as being contractual is at the core of the ideology of Western capitalism.

The faith that is placed in this tradition, and this form, of political and moral theorising, this technique, cannot be sustained. Indeed, a decisive break is occurring in our world-view. The belief that truth was accessible through language has been undermined, because language has come to be seen as a self-contained system in which reference is to the system itself. At the same time, the Newtonian, mechanistic world-view has also been undermined by relativity and quantum mechanics. Even inanimate entities are to be understood as subjects that adapted to their environment. Consequently, reality can no longer be understood solely by analysis and reduction to component parts.

Understanding has to be approached in a holistic manner. Indeed, even when taking a holistic view there always is uncertainty as to the completeness of that view. The result has been a loss of any sense of objective certainty in the physical sciences or in the political-cultural sphere.

The present author approaches this attack on Modernity from the perspective of a Christian in the reformed tradition, rejecting the Enlightenment's attack on revealed religion and the associated search for an alternative source of certainty. While absolute truth must exist that truth beyond human reach and our search for truth is personal, limited, and tainted by self-interest and sin. This view leads directly to a rejection of the absolutist claims of economic rationalism, and of rationalism more generally.

Our justification of this position in a secular fashion involves a number of closely interrelated influences that support the Enlightenment faith; the problematic distinction usually made between positive and normative economics, the privileged epistemological status of science, the excessive faith in rationalism, the questionable status of economics, and the relevance of moral philosophy to public policy formulation.

The first of these influences in modernist theorising, is the distinction social scientists have often made between science and normative theorising. It reflects the recent philosophical distinction between 'is' and 'ought', 'facts' and 'values'. In economics, the distinction between positive and normative economics dates from Nassau Senior and John Stuart Mill. This positivist turn may have been a reaction to the progressively widening of the scope of science, and a nostalgia for the Platonist demand for a single, universal scientific method.

But it is a mistake to believe that explanatory theories occupy a privileged epistemological position compared to normative theories. Further, this account question whether any social science can be value free, or indeed, that science begins from a foundation where certain things are beyond doubt. The positivist distinction between facts and values can only be sustained if there is a value-free vocabulary that renders sets of 'factual' statements commensurable. But there is no such vocabulary. Indeed, seventeenth century science and philosophy confused the fact that Galileo's vocabulary worked with an absence of metaphysical comfort. The resulting Cartesianism was a

philosophical fantasy in the spirit of Plato. It involved a state of consciousness combining inarticulate confrontation, and formulation through language. From this perspective the idea of value neutrality is simply another unsustainable aspect of Modernity.

The privileged status of science is also under sustained attack. Certainly the hypothetico-deductive model of scientific investigation has been overthrown. Strict justification simply does not exist. It relies on belief in absolute distinctions between logic and language, language and reality, and theory and practice, beliefs that are untenable. Consequently, the belief that scientific knowledge is an accurate, let alone a full representation of what is out there has to be abandoned. Rather, knowledge is socially justified belief and there is no need to consider it as accuracy of representation.

This is not some minor quibble within the philosophy of science but a fundamental attack on the entire Enlightenment project, the tradition founded by Descartes. The paradigm of human activity in the Western philosophical tradition has been knowing, the possession of justified true belief, or belief so intrinsically persuasive as to make justification unnecessary. Consequently, Western philosophy's central concern has been to construct a general theory of representation. But there is no 'Archimedean point' that would enable one to have a foundation to all knowledge, and thus it is necessary to give up the desire for a uniform and normalised sense of truth. The search for a transcendent, indeed transcendental, form of justification is a consequence of the way Christianity and other forms of transcendentalism have shaped Western culture. The modern Cartesian-Kantian attempt to find non-historical conditions for any possible historical development provides intellectuals with a substitute for religion, justifying their activities as intellectuals and providing their lives with significance.

One consequence of these pretensions is that we are the heirs of three hundred years of rhetoric about the importance of distinguishing sharply between science and religion, science and politics, science and art, science and philosophy and so on. These pretensions, and these distinctions, are absurd. Rather, justification is a social phenomenon, a conversation and not a transaction between a knowing subject and reality. Thus philosophy's attempt since the Greeks to explain 'rationality' and 'objectivity' in terms of the conditions of representation is a self-deceptive effort to

eternalise the normal discourse of the day. It forms part of an attempt to spell out the Greek claim that the crucial difference between men and beasts is that we alone can know universal truths, numbers, essences, the eternal. The alternative conversational approach, hermeneutics, is not a successor to epistemology but an expression of hope that the cultural space left by the demise of epistemology will not be filled.

Indeed, the very project of modernity has lost momentum. As indicated earlier, the philosophers of the seventeenth century were responsible for new ways of thinking about nature and society. In particular, Galileo in physics, Descartes in epistemology, and Hobbes in political theory committed us to new and 'scientific' ways, and the use of more 'rational' ways of dealing with the problems of life. It was assumed that uniquely rational procedures existed for handling the intellectual and practical problems in any field of study, procedures which involved setting aside superstition, mythology and tradition and attacking problems free of local prejudice and transient fashion. But such philosophical theories overreach the limits of human rationality.

In the state of general crisis that was the seventeenth century, the scope for reasonable debate was narrowed, limiting 'rationality' to theoretical arguments that achieved a quasi-geometrical certainty or necessity. This narrowing involved a rejection of the humanist values of the Renaissance, its sceptical tolerance, and its practical doubt about the value of theory in such fields as theology, natural philosophy, metaphysics and ethics. For the humanist philosophers of the Renaissance, as for Aristotle, the good had no universal form. Consequently, sound moral judgement always respected the detailed circumstances of specific kinds of cases. In contrast to Aristotle's practical wisdom, the dream of seventeenth century philosophy and science was Plato's demand for theoretical grasp. As a consequence, these seventeenth century philosophers set aside any serious interest in the different kinds of practical knowledge, the oral, the particular, the local and the timely. Logical analysis was separated from and elevated far above the study of rhetoric, discourse and argumentation. Similarly, a distrust of human feeling reinforced the Cartesian or calculative idea of 'rationality'. As argued above these rationalist dreams were always absurd. Consequently, the charms of logical rigour have to be unlearned. What is needed is not new, more comprehensive, universal and timeless systems of theory, but limits the scope of even the best-framed theories, and a rejection of the intellectual reductionism that became entrenched during the ascendancy

of rationalism. It calls for more sub-disciplinary, trans-disciplinary, and multi-disciplinary reasoning in the search for patterns that can provide some guidance for action.

The next step in the argument is an examination of the implications of its critique of rationalism, and the associated rejection of the value free status of social theorising, for the self-understanding of economics. In response to these developments, some economists have begun to take a hermeneutical approach to economics, claiming that economists have begun to see that their talk is rhetoric. Some have also attacked the pretentious scientism in which economists couch their mutual persuasions, seeing economics as ideological, a belief system conditioned by its political and social premises. While these insights have encountered strong resistance, they have the effect of undermining the confidence that would otherwise be placed on the pronouncements of economists on public policy issues.

It is at this point that we encounter the superficially helpful suggestion that economists should study moral philosophy if they are to offer policy advice. But such a strategy cannot escape the damming criticism of rationalism. The Enlightenment's search for basic principles of ethical action has run into the sand. The Enlightenment, having discounted the virtues and dismantled the metaphysical and teleological superstructures of the medieval world, has left a vacuum. All other sources of meaning and belief have been dismissed for the arena of public debate to the internal thought processes of the individual. They have been 'privatised'. Consequently, no other tradition can assert itself as the sole claimant of a shared and public conception of what the good might be. Indeed, conflicting moral traditions are embedded in our moral vocabulary, culture and traditions.

Indeed, contemporary moral philosophy is characterised by radical disagreement, interminable argument and incommensurable premises. There is no rational way of securing moral agreement in our culture, that economists can access through moral philosophy. The study of moral philosophy cannot protect economic analysis of public policy problems from value judgements. If economic analysis is not neutral the next step is surely not a further adventure into the complexities of moral theory. Rather, the questions that should be asked are what values are embedded in economic analysis,

itself, and how well do these values align with the values of the communities that economics serves. This might lead to an empirical investigation of agents' values. But it is already clear that such a turn will not yield a single, clear and consistent account. Nor may we be able to articulate the content of those moral values successfully through a rational account. Certainly, they cannot be reduced simply to rules. Indeed, it is questionable whether we already possess, or will ever possess, the moral vocabulary necessary to determine whether we are doing justice to others. We should not think of our distinctive moral status as 'grounded' in our possession of mind, language, culture, feeling, intentionality, textuality, or anything else. All these ideas are simply reflections of our awareness that we are members of a moral community. Rather, what counts as moral sophistication is the ability to wield complex and sensitive moral vocabularies.

This emphasis on the existing moral vocabularies stands as a healthy correction to the Platonic system building tendencies of Western rationalism. Indeed, Platonic presupposition have lead to everyday morality being depreciated as relativistic and inferior. Absolute claims are preferred because they deliver the illusion of moral clarity. They also convenient in that such a complete morality has to be presented by a higher authority or by morally elite figures. Such a view permits the use of morality and the manipulation of guilt as instruments of political control by the political elite. In the case of economic rationalism they are used to suppress the efforts of the disadvantaged to promote their own good. Indeed, the way in which social science organisations are established and maintained in contemporary society facilitates the use of social science as an ideological and manipulative instrument.

## REFLECTION

Human laws, such as the law of contract, should be seen as tentative and imperfect social constructs, and not as absolutes, mystical or otherwise. This view challenges classical contract law and theory as it developed under the influence of positivism in the nineteenth century. But this positive tendency of nineteenth century law, and social science, including economics, had its origins in the Enlightenment project, a project that has come under damaging attack, and deservingly so. Consequently, the belief in the explanatory possibility of general laws capable of making predictive statements in the social sciences has fallen dramatically. Thus, we should be wary of grand theories and

sacred rules especially when they bear no close connection to reality. Rather, the social world should be seen as being complex, multi-factored and interdependent. Attention has also been directed to the collapse of the philosophical dualisms that have characterised all forms of theoretical debate since the Enlightenment. Our language cannot sustain these efforts to formulate categories that are mutually exclusive and final. Indeed, the idea that human reason could discover immutable metaphysical principles that could explain the true nature of reality is an illusion.

The idea that legal or ethical reasoning could imitate geometrical forms of argument has also been called into question because moral or political choices were inevitable in long chains of deductive reasoning. Indeed, such forms of reasoning have, themselves, come under sustained attack. There are no laws of logic or mathematics that are attributable to the universe or to human reason. Logic and mathematics are purely tautological, the elaboration of the implications contained in the definitions used, according to socially created formal systems of thought.

The total social environment may be too complex and the human mind too limited to fully understand the scope and operation of our social activities. The rejection of the possibility of 'rationally' demonstrating the truth of ethical or political theories has left such ideas without a foundation – a convincing 'theoretical' base. But this does not undermine the significance of such ideas for the stability of society. Nevertheless, it does mark a deep loss of confidence in scientific rationalism and its associated moral speculation. Consequently, it challenges the application of that speculation, particularly economic speculation, to public policy. Economic speculation in its Newtonian guise is simply one way among many of speaking about the world and there is no reason to afford it priority over other ways of moral speaking. All our theoretical language is metaphorical. It therefore cannot be real, it can only ever be, at most, an approximation. Thus any description can be valuable but is necessarily incomplete, and cannot exclude other description. This failure to achieve conceptual uniformity does not reduce us to impotency, however. It simply point to the fact that policy development is inherently experimental, in which the criteria of success are human inventions.

Indeed, the Enlightenment's assumption of a rational and benevolent universe is fundamentally wrong. Freedom and change necessarily entail finitude, failure,

uncertainty, decay and sin. This is a view that undermines faith in the inevitability of unaided human progress. But it is a view that does not lead to any reinstatement of natural law, absolute human rights or Aristotelian virtue. Rather, it leads to a humble journeying, an uncertain search for the right and the good. It is always uncertain, it is always a groping. Dogmatism has therefore to be foresworn as we can only see a partial and distorted vision of the Kingdom. The kingdom that can be grasped is not the Kingdom. Reality always falls short of the Kingdom, though it is an image of the kingdom that inspires a striving for newness of life. Consistent with the above is a covernantal view of justice that involves a revelation of a just, merciful God who directly engages in the formation and sustaining of righteous living in community.

The Enlightenment's search for a secular alternative to traditional religious authority is itself a religious search, serving the same dogmatic and legitimising functions as Bergson's static religion. Indeed, economic rationalism threatens to become the dominant, rationalist and fundamentalist religion of contemporary global capitalism, a religion with particular appeal to the powerful and the greedy because it does not challenge their values. It is leading to the commercialisation of all human activity and the atomisation of individuals and the destruction of competing values and groups. Money has become the source of salvation and meaning. Indeed, this similarity between economics and religion has frequently been noted. For the theologian the language of the business pages is familiar. Thus, the market has become the most formable rival to traditional religion.

This critique has much in common with the critique of technological society advanced by Ellul and Winner. For them technique and its principle of efficient ordering is sacred in our society. Technique and efficiency have progressively mastered all the elements of civilisation so that the rationalisation of society has extended beyond the willingness of anyone to own responsibility. Efficiency has become its own end, beyond ethics. Technical means have become ends in themselves. Thus, autonomous technology is taking over the traditional values of every society, subverting and suppressing those values to produce at last a monolithic world culture in which all non-technological difference and variety is mere appearance. These technological influences have become so much a part of everyday life that they have become invisible. These influences pose

a particularly significant threat to liberalism as technological society is incompatible with representative government.

We argue that this critique of rationalism, and economic rationalism, should lead to humility in policy development, accepting the limits of our abilities and of our techniques and speculations. In particular, such humility should lead a refusal to use economic concepts at such a high level of abstraction that they loose touch with empirical reality. It should also lead to postulating particular moral principles as having priority. Economics does not and cannot provide the overarching theory of social action. Nor is there an ideal form of social or economic organisation against which to measure our organisational arrangements. It should also lead us to avoid seeing the world through simple dichotomies, dichotomies like public *v* private, and state *v* market. Such dichotomies fail to recognise the interdependencies in our economic and social systems. Indeed, our economic and social systems are complex and may not be understandable through the reductionist method, as the whole may be greater than the part. Indeed, there is a fundamental mismatch between the reductionist way of looking and the nature of reality in complex systems - there is no perfect system to be discovered, no magic word that would remove our responsibility for ourselves, and each other. Thus, there is no right approach to policy or to organisational arrangements. The important question is 'what works'? But it is a question that cannot be answered in isolation from our moral, religious and political traditions.

The danger is that economic rationalism with its program of radical restructuring of social and economic arrangements may be undermining the institutional capital on which our social and economic system depends. Thus, it is important to recall that greed is one of the prime threats to our civilisation. But economic rationalism is justifying that greed. Importantly the application of economic rationalism to policy decisions cannot be reconciled with the ethical import of our Christian heritage, with its commands to love God, and to love one's neighbour as oneself. Taking something that is a good, like economic analysis, or markets, or human rights, or liberty, or law, and turning into something that is an absolute is the essence of idolatry.

NO PAGE Nos 22+23
TEXT OK.

# CHAPTER 2: THE SOCIAL ORDER AND ITS REQUIREMENTS

*Without justice, all kingdoms are but bands of robbers.*

St Augustine City of God[1]

## INTRODUCTION

Public policy debates in Australia, like those throughout the rest of the developed world, have been heavily influenced by what has become known in Australia as economic rationalism. While the term lacks precision it attaches to the recent use of economic concepts to justify a strong faith in markets and an associated distrust of the role of government. Pusey's account of a "new and minimalist laissez-faire state set in norms that come from a dominating neoclassical economic rationalism that is anti-statist, anti-union and either asocial or anti-social in its basic orientation to policy"[2] serves as an adequate description of the policy orientation associated with that economic rationalism. An alternative term like 'market fundamentalism' might have been preferable because such views are not solely the possession of the economics profession, nor are they necessarily held by a majority of economists, some of whom may be unfairly condemned by association. Nevertheless, it would be fair to say that such views currently represent a dominant school within economics and, consequently, this thesis will defer to popular usage.

Importantly, economists do speak on public policy issues with apparent authority, and they claim, at least to some extent, to derive that authority from their economic expertise. It is far from clear, however, that any such claim is legitimate. Nevertheless, economists have been active in public policy debates from the dawn of the profession, often in opposition to social action in support of the underprivileged. For example, for Malthus in 1798 economic science had found that man, with his inherent self-interest, was inert, sluggish and adverse from labour unless compelled by necessity to be otherwise". The problem of the poor was the problem of population: there were too many poor; they were redundant. The only way to eliminate pauperism was to eliminate

the humanitarian reforms that permitted the poor to maintain themselves and to propagate.[3]

Ricardo[4] supported Malthus in his opposition to the Poor Laws.

> "While the present laws are in force, it is quite the natural order of things that the fund for the maintenance of the poor should progressively increase till it has absorbed all the net revenues of the country"[5].

Much more recently in 1943, Walker[6] noted the increasing influence of economists on public policy in Australia and more recently still Pusey[7] has taken to criticising it. Indeed, Markoff and Montecinos notes that this increasing influence is a worldwide trend and that in many countries economists have come to dominate civil service recruitment.[8] Certainly this has been the case in Australia particularly in the case of the central coordinating agencies - the Departments of the Treasury, Finance and Prime Minister and Cabinet. Those coordinating agencies, particularly Treasury and Finance, have long opposed interventionist programs.[9] From these centres of bureaucratic power, economic rationalist views have largely colonised the senior levels of the Commonwealth Public Service.[10]

This, of course, should come as no surprise given the key role played by the Department of Prime Minister and Cabinet (especially since the abolition of the Public Service Board) in selecting Departmental Secretaries, and the tendency of 'new brooms' to replace or sideline those whose views lack the 'flexibility' or 'rigour' said to be required by our economic circumstances. These processes seems to have been assisted by the curtailment of rights of appeal in respect of appointments to the more senior levels, a curtailment justified on the basis of improving efficiency. Indeed, these views appear to have substantially colonised private sector lobby groups operating in Canberra, who draw much of their staff from the ranks of the Commonwealth Public Service.

The above account of the influence of 'economic rationalism' within the Commonwealth Public Service is consistent with the account given by Pusey. This influence has continued beyond the time of his account and reached a new intensity with the election of the Howard government in 1996 and that government's 'discovery' of a

serious budgetary shortfall. The resulting policy choices involved the Prime Minister's invention of a distinction between 'core' and 'non-core' election promises, major program cuts, and the substantial downsizing of the Commonwealth public service, all in the name of fiscal responsibility.[11] Pusey's description of the organised destruction of corporate memory in many areas of the public service in the name of 'flexibility, responsiveness and effectiveness' strikes a particular chord in this recent experience.[12] Associated with that organised 'forgetfulness' was the 'voluntary' redundancy of large numbers of experienced and dedicated public servants. A cynic might conclude that these redundancies were deliberately engineered with a view to destroying the capacity of the Commonwealth Public Service to implement more 'interventionist' and socially responsible policies. If so it has something in common with the malicious and organised intimidation of dissenting political opinion that we have seen in a much more extreme form in other polities.

This thesis points to what has been termed the Fair Trading debate as contemporary policy debate involving fundamental questions bearing on the functioning of the capitalist system and the relationship between economics, ethics and the law. This particular debate, like many other contemporary policy debates, was impoverished by a failure of important participants in that debate to fully understand that the basic preconditions for an a effective capitalist system is a dynamic and effective civil society. In order to capture an adequate understanding of that dependency, it is necessary to go back to basics and consider how social order as such is possible. It is concluded that in an effective civil society the pursuit of individual and institutional choice and 'self-interest' is heavily constrained both by internalised moral codes and by externally imposed social sanctions.

Economic rationalists have also failed to understand the epistemological limitations of their discipline, the moral assumptions that they employ, and the implications of the existence of asymmetries of knowledge and power for the fairness of the market system. Looking further ahead it is suggested that economic rationalism involves the making of an organisational technology, the so-called market system, into a theology. An elite group of technologists, economics and their allies, is engaged in a foolhardy attempt to

remake civil society in the image of their idealised technology. In doing so, they run the risk of undermining the basis of both the economic system and of civic society.

This view has significant implications for the regulation of economic activity in particular and for the relationship between civil society and the economic system in general.

## ASSUMPTIONS UNDERLYING CONTEMPORARY PUBLIC POLICY DEBATES

Central to that impoverished understanding are two key, but hidden, assumptions that have been introduced into contemporary public policy debates by economic rationalists. This has been true of the recent Australian Fair Trading debate. That debate is particularly important because it raises in a stark fashion the relationship between the economic system and the social system and questions about the role of the state in supporting economic activity. Thus it provides an ideal vehicle to explore the influence of economic ideas on a fundamental legal institution. This chapter commences an examination of these two assumptions, that is the autonomy of market institutions; and the primacy of the economic system over the social. These assumptions critically determine how the fair trading debate is viewed. In particular it is the presence of these two assumptions that has allowed economic methodology to become the dominant methodology for the evaluation of public policy choices in our society. The vocabulary of economic with all its entailments now provides the dominant vocabulary for policy evaluation and consequently 'economic efficiency' has become the dominant value served by government policy.

To provide the framework in which these assumptions can properly be considered it is necessary to go back to basics and ask how social order is possible and what are the nature of the threats to that order?

## THE BASIS OF SOCIAL ORDER

This question has long been at the centre of philosophical and sociological inquiry.[13] It is also closely related to the central questions of political life, namely, How should society be organised? How should the resources of society be distributed among its members? What is the extent of our responsibility for other human beings? How much should individual freedom be restricted, and in what ways?[14] In so far as these questions ask what *ought to be,* these questions are moral ones - they ask about what is good, what is bad, and involve the fundamental questions about who we think we are.

While much contemporary discourse emphasises the primacy of the individual, contrasting a methodological or economic individualism with more corporatist notions, this thesis starts from a position which sees the individual embedded in society. Thus a theoretical discourse focussing on whether the individual is 'prior' to society or vice versa is a sterile exercise. Individuals both constitute, and are constituted by, society. The human "I" only discovers itself in encountering another "I" and comes to maturity as a person in a community.[15] In short, there is no "I" except in contrast to, and in relationship with, the "not-I". As Stark argues: "Here we are challenged to realize that the self and society are also coequal and coeval; that they are . . . twin-born."[16] And again, "Think society away, and Homo sapiens disappears; what is left is a speechless, mindless beast."[17]

There is no pre-social human nature. Social life is not an optional extra, something added onto human life, but is an essential part of it, including our origins, our coming together, our discovery of meaning and our continuing development.[18] This means that there is no way to strip culture away in order to get to a more *essential* human nature in the way that many theorists since the Enlightenment have attempted to do.[19] Consequently, individuals are only partially sovereign and autonomous. The formation of our values and even of our consumer preferences is a thoroughly social process. Consequently, neither the individual nor the social has legitimate explanatory or moral primacy.[20] As Emmet[21] argues:

> "we are too much members of one another to be able to detect just where other people's influence ends and our own efforts begin."

The extreme methodological individualism of the dominant school of neo-classical economics makes it difficult for economists to understand how economic action is constrained and shaped by the structures of social relations in which we are all embedded.[22] The consequence has been a stubborn refusal on the part of economists to examine the formation of preferences on the basis of the doctrine of consumer sovereignty. McPherson[23] goes so far as to claim that mainstream economics has been *defined* by the principle that the nature and origins of consumer tastes and preferences lie outside the proper domain of economic inquiry, while Boulding jokingly refers to the immaculate conception of the indifference curve.[24] But beyond a certain very minimal level our wants can be changed. The neglect of the formation of our preferences is a direct consequence of economic theory's commitment to the 'reason' side of Cartesianism. Economics does not explore the complex of motives or feelings that lie behind human choices, but rather explores the rational choices of 'ideal' producers or consumers, investors or policy makers. In this rationalist world, calculation is enthroned as the distinctive virtue of human reason while the life of the emotions is repudiated.[25]

**Social Order is an Evolved Complex Moral Order**

Even our earliest hominoid ancestors seem to have lived as members of social groups. The evolution of the human race, and particularly the emergence of intelligence and symbolic capacity, entailed a complex in which the organised hunting of large animals, life in organised social groups, and the making and the use of tools were interconnected[26]. As Keesing put it,

> "the whole pattern evolves together; changes in physical structures and changes in behavior, both genetically and socially transmitted, are tied together"[27].

Kessing argues that our behavioural potentials appear to be many-sided, complex, culturally shaped and socially expressed:

> " . . . the human behavioral repertoire entails countervailing tendencies. Humans probably do have behavioral tendencies to dominate, to compete, to be

> aggressive (though probably not to be territorial in a strict sense). But they also have tendencies to share, to cooperate, to be altruistic. Institutions and customs may intensify competition, reinforce dominance, or express aggression in warfare and combat; but they may reinforce our propensities to share, cooperate, be egalitarian and peaceful"[28].

Each and every human custom is a system of ideas with a social and political history. These ideas may result partly as expressions of our psychobiological dispositions, but these dispositions will never provide adequate explanations of the meanings humans have built on them[29]. Our biological nature is not *prior to* culture rather it is expressed *through culture.* It means that our behavioural propensities depend on symbolic capacities and cultural learning for their focus and definition[30].

This term *culture* is not always used in an entirely consistent or precise manner but high precision is not necessary for our purpose. For example, Geertz defines culture as

> "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitude towards life".[31]

Culture in this sense is restricted to meanings, symbols, values and ideas and encompasses phenomena like religion and ideology. The definition Fukayama uses draws on both culture and social structure and comes closer to the popularly understood meaning of culture as *inherited ethical habit*.[32] Culture in both senses is something we learn as children growing up in a society, and discovering how our parents and those around us interpret the world. This process of socialisation, the learning of a culture, is a process of sharing of knowledge. We share it with those from who we learn and it is this shared learning, which makes human social existence possible[33]. Culture is thus the system of knowledge by which people design their own actions and interpret the behaviour of others. This knowledge provides us with the standards we use for deciding what is, for deciding what can be, for deciding how one feels about it, for deciding what to do about it, and for deciding how to go about doing it[34]. The creation and sustaining

of such shared meanings is, itself, a social process in which moral knowledge is incorporated into a society's moral vocabulary and social discourse.

As should be clear from the above, this social order is acknowledged to be a moral order; it determines how we *should* act. As Durkheim points out:

> "we are involved in a complex of obligations from which we have no right to free ourselves . . . Thus, altruism is not destined to become, as Spencer desires, a sort of agreeable ornament to social life, but it will forever be its fundamental basis. How can we ever really dispense with it? Men cannot live together without acknowledging, and, consequently, making mutual sacrifices, without tying themselves to one another with strong, durable bonds. Every society is a moral society."[35]

The study of social life is therefore a study of social norms and the institutions in which they are embodied. It involves not simply regularities in conduct but regulated conduct.[36] It is shared values that act as the mortar that binds together the structure of each human community with rewards and punishments based on those commonly held values. And it is the pervasiveness of these values which gives each person a sense of belonging, a sense of community.[37] Indeed, human survival depends on cultural conformity to a limited number of patterns for organising behaviour. For most, conformity is a result of the internalisation of values, conceptions of what is desirable, providing security and contributing to both personal and social identity. Such values are criteria that people use to make choices. But such cultural knowledge is often tacit; it is so regular and routine that it lies below a conscious level.

Sociability, then, is not simply a natural trait. Rather, social phenomena are due to both nature and nurture. But what is distinctive about human beings is our capacity to control our 'animality', a capacity that other species lack.[38] The process of nurture, the process of socialisation is a process of moralisation.[39]. For sociality to survive requires a system of discipline that sets limits to, and works against the drives which we have inherited. Consequently, apart from culture, human beings are no more than another

animal. It is this control which makes human civilisation possible and it is only then that higher values can influence human conduct. Sahlins supports this proposition:

> "It is an extraordinary fact that primate urges often become, not the secure foundation of human social life, but a source of weakness in it . . . In selective adaptation to the perils of the Stone Age, human society overcame or subordinated such primate propensities as selfishness, indiscriminate sexuality, dominance and brutal competition. It substituted kinship and cooperation for conflict, placed solidarity over sex [and] morality over might."[40]

This viewpoint is widely held, being consistent with the sociological tradition represented by Durkheim. Hume makes a similar argument:

> "It is certain that self-love, when it acts at its liberty, instead of engaging us to honest action, is the source of all injustice and violence . . . We must allow that the sense of justice and injustice is not derived from nature, but arises artificially, though necessarily, from education and human conventions . . ."[41]

For Stark, it is the control of greed broadly defined, a control exercised by the social norms, which in particular constitutes a crucial victory of culture over animality.[42] He sees what he calls society's primary laws as emerging out of those social norms, and forming a subset of those norms. These norms, a society's *ethos*, are not only taught to us by our parents, they are communicated to us by fairy tale, fable, saga and legend, symbolism and ceremony, and by literature both artistic and educational. These norms always operate in conjunction with ethical and religious teachings. Indeed, for Stark, religion is behind the other ethos-building institutions. At the very least, the religious sanction has functioned as a mechanism filling gaps left by custom and law. This is because the pressures making for law-abiding cannot be comprehensive because only crude offenders are detected, they leave the inner dispositions largely unaltered, and cannot insist on the performance of good deeds.

In these circumstances, the belief that our moral conduct will ultimately be rewarded or punished by some transcendent judge provides a powerful incentive for moral conformity. Indeed, Stark, drawing on Bergson and his concept of static religion,

doubts whether society and culture could survive without a metaphysical prop of some kind. Even in our partly secularised society, religious conceptions have not been eliminated. Not only do traditional religious views survive in a significant proportion of the population but powerful religion substitutes such as the deification of nature, and of history have a similar influence. It is for this reason that Plato made citizenship rest on the maintenance of orthodox belief, while his guardians, in their priestly role, were to develop a theology and maintain the moral standards of the community.[43] In this regard, this thesis will argue later that economic rationalism derives much of its force from the fact that it operates in a similar fashion to justify the values of the market system and of its adherents

For Stark, drawing on the American social evolutionist, Sumner, the development of social norms and institutions has been the result of a long process of moral and social search and experimentation:

> "What Sumner saw at work, in the lap of society, was a process of selection separating by way of trial and error, useful and disappointing expedients, and leading to the adoption of the former and the discarding of the latter. The guide in this never resting and never ending stream of experimentation is not pure but practical reason, not ratiocination, but, rather, common sense. General principles of action may and do in the end emerge, but they are merely abstract formulations, summings up, of concrete experiences."[44]

The conviction that humans themselves have created the social system within which they have their being is central to this point of view. Indeed, for Stark, the self-creation of society is the greatest of all social phenomena. What has been selected in this historical process of evolution has been ways of behaving that mitigates the war of all against all. Hayek also describes an historical, evolutionary process of trial and error for the development of social rules.[45] Successful action results in the rule being selected, whereas unsuccessful action results in the rule being discarded. Indeed, for Hayek most knowledge is obtained in the continuous process of sifting a learned tradition.

Importantly if humankind has made society in the process of its own evolution it is not the pure product of 'nature' whatever that word might mean. Equally, if humankind has made society, it has also made the economic system. Importantly, the process described by Sumner appears a typical innovation process involving the accumulation of numerous, incremental changes leading to significant change overall. It is also clear from the above that culture is not a once-for-all influence but is an ongoing process continuously constructed and reconstructed during human interaction.[46] Consequently, history matters. The entire cultural and consequently the institutional environment (laws, rules, conventions, norms etc.) within which the institutions of governance are embedded is the product of history.[47]

During the course of his argument, Stark draws a strong distinction between humankind and other animals. This strong distinction is inconsistent with more recent research into primate behaviour. It would appear that the situation is more complicated than Stark and many others allow, there being no necessary opposition between the influence of instinct and of learning. Among recent commentators, Reynolds[48] explicitly rejects the proposition that human evolution has been characterised by the replacement of instinct by culture. Rather, human behaviour and animal behaviour more generally appear to involve a complex interaction between instinct and experience. He argues that there is a great deal of behavioural continuity and that the instinctive systems that function in animals have parallels among humans. There appears to be a 'progressive' development of social behaviour, particularly among primates. We also appear to share much of the same emotional equipment. Reynolds concludes that a theory of human evolution that presupposes the development of reason at the expense of emotion, or of learning at the expense of instinct, conflicts with the evidence. Importantly, he argues that the relationship between reason and emotion is not one of hierarchy but of specialisation by function, the brain integrating different kinds of information into a unified course of action. Consequently, the progressive evolution of primate cognition did not depend upon the replacement of innate behaviour by learned behaviour but by the selection and control of innate behaviour by conceptually stored information. However, the comparative evidence also supports progressive changes in the capacity for

conceptualisation, in instrumental skills, and in the volitional control of behaviour over the course of human evolution.

Consequently, this recent research does not undermine the argument that social life is only made possible through the disciplining of what Stark calls our animal nature.[49] Indeed, not only have our instincts been tamed, but they have been transformed into factors making for social cohesion. None of this involves any necessary inconsistency with the view that there is some limited, innate human tendency towards cooperation. Nevertheless underneath human culture, animal nature is still present and needs permanent control. At best socialised man is semi-moralised up to a moderate standard of law-abidingness. Every society must therefore guard against antisocial conduct; it must have and apply sanctions, which will eliminate, in so far as this is possible, criminal behaviour in the widest sense of the word. Unfortunately, we adjust to social life in two ways, by internalising and operating its norms and by internalising and manipulating them. Normal growing up unavoidably involves learning how to seem social as well as how to be social - not only how to serve, but how to hold our own, to manipulate and how to exploit.

**The Maintenance of Social Order Involves Moral Struggle**

The maintenance of social order involves a struggle within the individual and between individuals, a struggle to control our behavioural tendencies to dominate, to compete, to be aggressive, those behavioural tendencies which Stark reduces to greed and lust. That this is consistent with our daily experience is widely acknowledged. For example, E A Ross warns us "society is always in the presence of the enemy".[50] But this is not a new intuition. As early as the fifth century, the Bhagavadadgita, a popular religious poem forming part of the Hindu Scriptures, claims:

> "What distinguishes men from animals is the knowledge of right and wrong. The world is dharmaksetra, the battleground for a mortal struggle. The decisive issue lies in the hearts of men where battles are fought daily and hourly."[51]

For the Christian Church also moral evil is omnipresent. As St Paul says about the middle of the first century AD:

> "I have been sold as a slave to sin. I cannot understand my own behaviour. I fail to carry out the things I want to do, and I find myself doing the very things I hate . . . for though the will to do what is good is in me, the performance is not, with the result that instead of doing the good things I want to do, I carry out the sinful things I do not want."[52]

Again, contemporary Christian theology talks about humankind's "torn condition"[53] in alluding to what has more traditionally been called original sin. These are claims about how the human world is. As the contemporary theologian David Tracey would have it:

> "The one piece of Christian doctrine that is empirically demonstrable is that there is something awry with the world."[54]

Indeed, the mainline Christian tradition has historically puzzled over the problem that evil, although not a metaphysical necessity, is an inevitable matter of fact. Every human being eventually, indeed inevitably, sins.[55]

In his *The Sociology of Religion*, Stark demonstrates that the Greek conception of hubris, the human bent towards self-aggrandisement, pride, and all associated forms of egotism, is comparable with, and runs parallel to, the Judaeo-Christian conception of original sin[56]. A shadow lies over every human being. We do not have the ethical stamina which we need, and it is this tragic flaw which Greek drama displayed on the stage. Of course, the Greek concept of hubris emphasised the tragic dimension of this darker side of human beings. Hubris in this sense is not pride but the self-elevation of the great beyond the limits of its finitude.[57] Thus while there is some difference of emphasis, the moral metaphysics of the ancient Athenians is not entirely different from the moral metaphysics of the Christian Church. Like the Christian Church it taught its audience that humankind is weak, fallible, and inclined to sin.

Of course, the traditional Christian view sees this human brokenness not simply in terms of one's alienation from one's fellows, but more importantly, in terms of humankind's

alienation from God and consequently from the rest of creation. In this view, evil is the result of a human turning from God. Receptivity to the presence of God is replaced by ego projections. Consequently, every human is apt to fail when put to the test. This tragic flaw is seen as the cause of humankind's inability to build a truly satisfactory society, a truly integrated social whole. As Pope John Paul II said in *Centesimus Annus*[58]:

> "A man is alienated if he refuses to transcend himself and to live the experience of self-giving and of the formation of an authentic human community . . . A society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people."

The Christian tradition goes on to suggest that an effective social order is only possible through a covenant relationship with God, a relationship which is both corporate and individual.

It is largely this doctrine of original sin, St Augustine's theological anthropology, as transmitted through the Protestant reformers, which found philosophical expression in Hobbes's war of all on all[59]. In Hobbes's frequently cited views, in a state of nature:

> "there is no place for industry; because the fruits thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of commodities that may be imported by sea; no commodious buildings; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no Arts; no Letters; no society; and which is worst of all, continuous fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."[60]

For Hobbes, it was only as a consequence of the discipline enforced by government that a civilised life was possible.

The more optimistic view that human kind and human structures are perfectible, such as is found in Rousseau, reflect what was in the fifth century, and again at the Council of Trent in the sixteenth century, condemned as the Pelagianism heresy. Rousseau thought

that human beings were endowed by nature with compassion for their fellow humans, a view he may have derived from Adam Smith and David Hume. Nevertheless, while generally holding that humankind in a state of nature was inherently good, Rousseau conceded that human beings were wicked and that the weight of human experience made it unnecessary to prove that this was so. He believed that human society induced people to hate each other to the extent that their interests clashed and to inflict each other with every imaginable evil. For Rousseau it was not true that private interests were linked to the public interest, but that they excluded each other. The laws of society were a yoke which everybody wished to impose on others, but not themselves.[61]

The point of this for current purposes is not theological but empirical; these traditional theological concerns about human sinfulness have been absorbed into secular discourse and then largely forgotten. They incorporate a profound insight into the human condition, an insight pointing to the fragility of our social order, an insight which we will ignore to our peril. Certainly, in our daily life we do not, and cannot ignore the fact that to be human is, *inter alia*, to be proud, to be vain, to want to dominate others, to get angry, to be vindictive, to be violent, to be vengeful, to be greedy, to be dishonest, to be untruthful, to be weak-willed, to be easily lead, to be self-destructive, to be frightened, to be confused and to become discouraged. Of course, we find it easy to see these faults in others. What is frequently overlooked is the insidious and ever present influence of these influences on *our own* actions, on *our own values* and on social values more generally. Reinhold Nielbuhr expresses it as follows:

> "The children of darkness are evil because they know no law beyond the self. They are wise, though evil, because they understand the power of self-interest. The children of light are virtuous because they have some conception of a higher law than their own will . . .. It must be understood that the children of light are foolish not merely because they underestimate the power of self-interest among the children of darkness. They underestimate this power among themselves."[62]

We cannot ignore this reality in our institutional arrangements. Indeed, Rousseau's importance lies in reminding us of potentially adverse consequences of these tendencies for our social, political and economic arrangements, an insight shared by Marx. The

consequence of these tendencies is that even our moral vocabulary can be subverted into an instrument of immoral conduct.

**The Maintenance of Social Order Also Involves the Creation of Moral Institutions**

Clearly punishment, or the threat of punishment, is necessary for a general climate of obedience to social norm. Thus there is an element of force in all forms of property, marriage and religion. In smaller and simpler communities unorganised social pressure may have been sufficient to maintain the social control necessary to guard against a war of all against all[63] though some genetically encoded sense of hierarchy may also have been important. What is perhaps more certain is that in its beginnings law was hardly differentiated from other forms of social pressure.[64] There can be no law without some capacity for coercion. The evolution of larger, more complex, more anonymous societies involved splitting the social code into two parts, custom and law, with organised law enforcement by persons forming part of a governmental apparatus. This perspective sees the state as having grown out of a basic social need for a coordinating mechanism especially to ensure safety and order with the state as the guardian, and enforcer of the key norms.[65] Indeed Stark argues that society solved one of its most difficult problems by placing a monopoly of the means of compulsion in the hands of the state.[66] Thus, despite all claims and appearances to the contrary, the law is a liberator not an oppressor, and so is the state as the ultimate enforcer of the law. But these moral functions can easily be subverted so that the state becomes an oppressor. This experience provides the motivation for much political philosophy, and for political programs aimed at regulating the role of the state itself.

But unorganised social pressure in support of key norms, and the organised enforcement of law and is not enough to ensure social order. We cannot do without a sense of guilt, the guilt flowing from the breach of internalised norms.[67] The survival of a community depends on its moral cohesion and that moral cohesion cannot be maintained by the coercive force of the law alone: secular restraints are not enough to deter evil, anti-social or merely illegal acts. Indeed, the healthier the society, the less it relies directly on legal sanctions - ideally, life in society should be lived above the law, not by it. The

Australian theologian Bruce Kaye in particular emphasises that social interaction degenerates when it is construed narrowly in terms of legal obligations. The law is a framework and a guide as to the character of the civic system, but is not the adequate dynamic for the civil community. Similarly within organisations, an effective dynamic goes beyond narrow legal definitions. The *ethos* or culture of such organisations is a vital motivating and shaping factor in the civil community that the organisation exists to create and serve. Thus if a corporate enterprise construes its place in the civic system and in particular in the market economy, in narrow legalistic terms, it will not create the civil community within its own life, or in its relationships to the host society, that will enable it to fulfil its basic purposes. More prosaically much contemporary management literature points to the role of goals, values and missions perform in maintaining organisational efficiency.[68]

Voluntary efforts to behave morally and to uphold the law; are necessary for complex social organisation for otherwise law enforcement would become impossible as well as tyrannical. These inward voluntary limitations, so necessary for corporate life are the product of conscience, conviction, and inward persuasion and belief, and cannot be directly imposed from without. Convention is thus society's strongest defence against both anarchy and the tyranny of an all-pervading disciplinary and coercive law. Dunstan's account emphasises the role of institutions as the means by which moral insights are given stability and permanence.[69] Without such institutions moral insights would be lost in time of need. This emphasis on conventions places a primary emphasis on morality as a common possession rather than as a matter of individual choice or decision.

For Dunstan, such conventions incorporate expectations as well as imposing limitations. We take the predicability necessary for social life for granted because we assume that we know what to expect of one another in roughly comparable situations. We can do so because a large part of our socialisation, our elementary social and moral education, involves training in the meeting of such mutual expectations. Such expectations involve a prescriptive element because social situations are understood as relationships in which certain conduct is expected as appropriate to the roles of the people involved.[70] Such

learned roles are themselves socially constructed. Fidelity, in this context, means meeting the expectations appropriate to one's role. In this context simply following the moral rules including obeying the law is not enough. Personal integrity requires one to be on guard against formalism and to be conscious of the live, human, ethical reality behind such obligations. In times of rapid social change such expectations may be fluid or imperfectly understood but there is a recognisable continuity and cohesion in them. Frequently there are conflicts between these roles and their accompanying obligations and consequently the need for moral judgement cannot be avoided.[71] Such role behaviour and the mutual support of people in their groups are a deep part of everyday life being bound up with our awareness of ourselves as agents. Thus Mead believed that a person is built up of internalised roles, so that the expectations of others become the self-expectations of a self-steering person.[72]

These conventions make great demands on us because they stem from our beliefs about what the community believes to be of worth. They include specific beliefs about the worth of people regardless of their specific characteristics; beliefs about the value of human relationships and the common interest in the truths upon which they stand. Such beliefs have a history, and in the case of Western societies can be traced in the twin roots of our culture, Greek philosophy and the Judaeo-Christian religion. But a fully-grown religious ethic, like that of the Judaeo-Christian tradition, goes far beyond mere utilitarian considerations into the supreme worth of sacrifice, in the transcendence of self in subordination and service to the other.

These learned moral traditions are complex and often tacit. Such moral judgements are neither simple deductions from principles nor simply calculation of consequences. Rather such moral judgement involve a skilled performance.[73] This is because our moral abstractions express general aims, which can not be made operational in a straightforward way through clear-cut 'means to ends' calculation, though such abstractions supply a general orientation for living. And as we have already seen there are conflicts in the roles we perform. Importantly, there are also conflicts between the abstractions we use. Downie, for his part, emphasises the emotional element in social morality: the ties generated by kinship, common religion, custom, language, traditional

ways of earning a living, traditional loyalties of all kind, and more generally shared broad cultural traditions.[74]

There are limits on the degree of variability in social rules. Social moralities must have certain structural features in common. Downie, drawing on Hart, lists a number of obvious truths as limiting the scope for variety: our lack of self-sufficiency, our limited benevolence, our approximate equal power, our limited understanding and skills and limitations imposed by the environment and scarcity.[75] Consequently we require means of limiting violence, exploitation and competition and means for encouraging cooperation. All of this implies that there is necessarily a strong element of consequentialism in social morality. But this does not mean that social morality is, or must be, limited to an examination of the consequences of action because the beliefs on which we act extend our moral values well beyond such consequentialism.

Not only are there social rules and expectations but there are social rules about social rules. Downie, again drawing on Hart, describes second-order rules of recognition, of change, of empowerment and procedure. For their part, Brennan and Buchanan[76] emphasise the importance of rules at the constitutional level. They argue that the natural predilection for conflict in the interests of players is substantially moderated in the choice over rules, but this seems to presuppose the existence of sufficient social capital to enable discourse about such rules. It is these second-order rules and moral principles that help us determine the moral legitimacy of government action. There is no reason to believe, however, that these add up to a coherent, consistent system. Nor, as Brennan and Buchanan point out, is there any reason to believe that the forces of social evolution will always ensure the selection of the best rules.

While there is wide divergence of view about the basis of our moral and legal principles, there appears to be strong support for the proposition that those moral and legal principles along with a sense of community provide crucial elements in the governance structures of our societies.

## CURRENT THEORIES EXPLAINING THE EXISTENCE OF SOCIAL ORDER

The above provides an evolutionary account of the development of social order supplemented by a discussion of some of the elements that make up that social order. In Chapter 4, an historical account will be given of various attempts to explain that social order. Such an account is important to subsequent discussion of the fair trading debate in Australia over the last twenty-five years.

Among many theorists, however, our evolutionary account will not seem satisfactory as an explanation of our social order however much the theorist agrees that something like that described actually took place. What will often be sought is a satisfying *theoretical* explanation, which is necessarily ahistorical, and which attempts to tease out what is *really* going on in society, what are the laws that determine the way things are. This involves making a distinction between occurrences which are not necessarily associated, that is, contingent, and occurrences that are concomitant, that is, that occur closely together, and which are taken to involve some causal relationship. Consequently, such an attempt at causal explanation involves a belief in the existence of some underlying influence or structure or law which creates an objective order, which our culture obliges us to observe, and which can be abstracted from historical reality with all its contingent elements in a way analogous to theoretical accounts in the physical sciences. The extent to which there are such underlying structures is problematic, however, given that this level of abstraction cannot be subject to falsification as in the physical sciences, ie it cannot be subjected to empirical procedures. The value of such theorising as a means of explanation is therefore problematic and the danger is that dialectic is simply substituted for 'proof'. Such theorising can be distinguished from a *theoretical* account that provides a *justification* for what exists or what is thought to be desirable. The latter does not usually involve an examination of the moral judgements that we actually make, and the values that underlie them, but rather an appeal to some plausible principle in an attempt to legislate what those moral judgements should be. Often these genuine attempts at explanation and judgement are associated with the theorist's desire to legislate particular judgements, explanatory or normative, about fundamental political and social institutions. The progression of such ideas involves an attempt to

differentiate a particular theorist's efforts from those of others. The whole project appears tainted by an unrealistic a-priorism, a search for unicausal explanations, and the drawing of tenuous distinctions.

No dominant theory has emerged from such efforts to explain the existence of social order and of our political and moral institutions. There are four dominant theoretical approaches to the social order problem; the private interest doctrine, situational analysis, the consensus doctrine and the conflict approach.[77]

The private interest theory assumes, as its name implies, that individuals are guided entirely by considerations of self-interest. Spencer is cited as a holder of an extreme version of this approach, believing that the pursuit of self-interest formed a self-regulating mechanism in society. Hobbes and Weber are self-interest theorists who emphasise the inevitability of conflict. In contrast to Hobbes, however, for Weber, competitive struggles often generate social regularities. George Homans, the best known contemporary exponent of a private interest approach, works with an exchange model based on free market principles. According to Homans, social interaction is social exchange involving such rewards as esteem, admiration, and respect and such costs as boredom, embarrassment, and expenditures of time . It is the informal rules governing these exchanges that provide for social order. However, the problem with such private interest theories is that that they are unable to explain how there could be sufficient similarities among individuals and enough continuity over time to have created organised societies. Nor, as is argued shortly, is it possible to explain all adherence to rules and laws by the calculation of benefits derived from them, or from fear of punishment. The existence of shared social norms is ignored, indeed, such theories have no room for moral notions like 'wrong', 'bad' or 'immoral. Consequently, such theories omit the moral dimension in human relations; moral discourse is not even possible.

Erving Goffman, a situational analyst also sees people as narrowly self-interested, acting out their roles as public means to private ends. Consequently, society is a pseudo-moral system in which everyone is busily engaged in the exchange of

impressions. However, situational morality stresses the importance of the properties and structures of situations in influencing social conduct. What is missing from Goffman's account is an adequate account of what it is to be human. He has no serious notion of human beings possessing a sense of personal identity. Missing is any commitment to moral standards other than those found in one or another social situation. Nor can he account for moral rules opposed to any derived from those social situations.

The vast majority of sociologists, including Durkheim and Parsons, are described as consensus theorists. For these theorists, social order is made possible by a consensus about shared values and meanings. Thus for Parsons, "Institutions or institutional patterns" are defined as:

> "Normative patterns, which define what are felt to be, in the given society, proper, legitimate, or expected modes of action or of social relationship... They are patterns supported by common moral sentiments."[78]

People are motivated to observe these normative standards through socialisation and social control and through the feelings of self-respect, guilt and shame. Phillips argues that such models are unable to account for social conflict, making too much of control mechanisms and too little of human spontaneity and inner conflict. It is also criticised as a tacit commitment to the status quo. More importantly, it is argued that such theorists are not committed to morality as such, but only to a moral system that yields order. Such theories can say nothing, therefore, about the moral status of a particular society. Thus fears about moral relativism are raised to dispute this tradition. Despite theses criticisms of the consensus approach there is much in that approach that is useful. In particular, Phillips agrees with Durkheim and Parsons and most other sociologists that individuals are motivated to act in accordance with normative standards. The internalisation of those standards helps provide much of the restraining control necessary for social order. Social order *is* made possible by consensus within a social system about normative standards. And, motivation to observe these standards can best be assured by the mechanisms of socialisation and social control. However, Phillips is

concerned that consensus theorists never consider the possibility of rationally justifying those dominant moral standards.

Conflict theorists like Coser and Collins place a strong emphasis on power relationships, coercion, competition, and the mechanisms of political allocation. They point to constraint, conflict over values and coercion. Indeed, for Coser such conflicts are functional in that they help to structure the larger social environment by assigning positions to the various subgroups within the system and by helping to define the power relations between them.

For Collins, however, social life is mainly a fight over the control of resources. What ought to concern us, according to Collins, is how various factors of power, coercion, control of resources and the like produced particular moral values and beliefs in the first place. For Collins, ethics are ultimately arbitrary, simply a device for dominating others. In the process Collins assumes that moral principles have only instrumental value. His doctrine makes it impossible to treat one another as moral beings. Phillips goes on to give an account of Goulder's critique of the functionalist concern with social order. Phillips reduces this critique to a criticism of the functionalist concern for quiet values like temperance, wisdom, knowledge, goodness, cooperation or trust and faith in the goodness of God. But nowhere does Goulder formulate and defend his own values.

This thesis shares Phillips' admiration for much in the consensus theories represented by the sociological tradition. But there is no need to reject in their entirety the other perspectives outlined. Clearly there is some truth in the transactions view of human society, it simply fails to provides anything like a complete account. Indeed, from the perspective developed in Chapter 2, it leaves out the bits that are most important. Similarly, there is clearly much conflict in social life and no account can ignore that conflict. Power relationships and coercion are an ever-present feature of social life. Indeed, the Christian tradition, with its emphasis on original sin, points to the possibility of abuse of power relations and of moral rules themselves. Thus there is no need adopt a unicausal approach

One important theorist not fitting the above is the rational choice theorist, Jon Elster.[79] He does not believe that the social norms can be reduced to any single principle. In particular, he insists that social norms cannot be reduced to rationality or, indeed, to any other form of optimising mechanism. Such a view cannot deal with the problem of free riding and the voluntary provision of public goods. Indeed, the rational self-interest of individuals may lead them to behave in ways that are collectively disastrous. He even suggests that a form of irrationality, what he calls magical thinking, plays an important role in many decisions to cooperate. Consequently, Elster briefly entertains the idea that civilisation owes its existence to a fortunate coincidence. He goes on to argue that altruism, envy, social norms and self interest all contribute in complex, interacting ways to order, stability and cooperation and thus provide the cement of society:

> "Every society and each community will be glued together, for better and for worse, by a particular, idiosyncratic mix of these motives."[80]

As already noted, the trouble with all such intellectual speculation is that, remote from the possibility of empirical falsification, it remains, at the end of the day, speculation. While ideas might be refined, and inconsistencies in particular arguments eliminated, conflicting ideas cannot finally be resolved. In addition we slip so easily and unconsciously between causal explanations and justification that explanations advanced as causal explanations rapidly take on normative power. Clearly it is important to have a vision of who we are to provide some grounding for our decisions. But there is a danger that we can become trapped in a fundamentalist implementation of a particular vision, to the exclusion of other perspectives. Marx is instructive in this regard:

> "Hitherto men have constantly made up for themselves a false conception about themselves, about what they are and what they ought to be. They have arranged their relationships according to their ideas of God or normal man, etc. The phantoms of their brains have gained the mastery over them. They, the creators, have bowed down before their creatures. Let us liberate them from the chimeras, the ideas, dogmas, imaginary beings under the yoke of which they are pining away."[81]

But such images are unavoidable if we are to have any discourse at all. And Marx's criticism can be applied with particular potency to his own thinking.

Another approach to explaining the existence of social order seeks an empirical grounding and involves an examination of the development of moral values in growing children. Piaget conceived of morality as a system of rules for social behaviour, and the essence of morality as the respect which individuals acquires for these rules. Piaget's account of moral development in children up to the age of twelve focuses primarily on its cognitive aspects, but it is not purely a cognitive process. Rather, it is an interactive process during which children's understanding of rules change. Thus Piaget's account involves a three-stage progression in a child's moral understanding: constraint, followed by cooperation, giving rise to generosity. Piaget sees generosity as a refinement of justice manifest in the concept of equity, which he considers a fusion of justice and love. Piaget noted that altruism, empathy and sharing are all evident in the behaviour of very young children but also noted that the legal sense is far less developed in young girls than in boys. In contrast, girls show a greater capacity for tolerance and innovation in their play. Gilligan suggests that girls avoid conflict rather than develop rules for limiting its extent and that Piaget was unduly influenced by his study of boys.[82]

Kohlberg extended Piaget's study of moral development in children into adolescence modifying Piaget's theory in the process. His is also an interactive theory with three levels of development: (i) the preconventional where rules and social expectations are external to the self, (ii) conventional where the self has internalized the expectations of others and (iii) postconventional where the self is differentiated from the rules and expectations of others, and values are defined in terms of self-chosen principles. These are further subdivided into two stages. Importantly, he sees the postconventional level as involving, firstly, a contractual-legalistic orientation and, then, a universal-ethical principle orientation. He suggests that very few people develop to such a stage. His is a unitary conception of morality as justice, by which he means equality in a democratic society. His account emphasises the role of social institutions in which the basic values of a society are embodied, down playing the influence of direct teaching. This could be seen as running counter to Freud and the sociological tradition with their emphasis on

the internalisation of social values, but there is no necessary opposition between these accounts: they involve a difference of emphasis towards the role of conscious moral reasoning and away from the unconscious, and from tacit moral knowledge. In commenting on Kohlberg's theory, Phillips concludes that cognitive moral development at every stage of moral reasoning is inescapably influenced by unconscious mechanisms, and by moral precepts that are acquired earlier and consciously available, and by the moral values and norms of the group and of the wider society.[83]

Nevertheless, this difference in emphasis does reflect Kohlberg's commitment to a rational, unitary account of a morality based on the concepts of justice and rights in which the rational individual standing alone is the ideal moral agent, entering with rights into fair contracts with others. However, he fails to present any persuasive evidence linking moral reasoning and actual behaviour. Indeed, there seems no reason to suppose that the capacity to engage in higher levels of moral reasoning leads to moral conduct. If this were so, we would expect there to be a disproportionate percentage of academic moral philosophers among those who engage in heroic good works and who we 'canonise'.

Current work in developmental psychology influenced by L S Vygotsky and A R Lura on the role of spoken language in the shaping of a child's capacity to think and act perspective undermines Kohlberg's Platonist aspirations.[84] Instead of children's mental equipment being part of a permanent 'human nature' with which all humans alike confront experience the internalization of speech is now seen as the means by which children acquire their native culture and thus their moral values.[85]

Gilligan a contemporary developmental psychologist, argues that Kohlberg's perspective reflects the concern of adolescents justifying by reason their separation from those to whom they were formerly bound. Its limitation lies in its failure to see a world of relationship, compassion and care. Whereas justice emphasises the autonomy of the person, care underlies the primacy of relationship. Indeed, Kohlberg's theory involves a general neglect of the emotional and behavioural aspects of moral development. In opposition to Kohlberg, Gilligan suggests that moral development proceeds along two

different but intersecting paths that run through different modes of experience and give rise to different forms of thought:

> "Whereas the analytic logic of justice is consonant with rational social and ethical theories and can be traced through the resolution of hypothetical dilemmas, the ethic of care depends on the contextual understanding of relationship."[86]

This ethic of care develops through relationships that give rise to an understanding of interdependence and is sustained by the ability to discern connection. The fundamental tension in human psychology between the experience of separation and the experience of connection is reflected in the age-old dialogue between justice and love, reason and compassion, fairness and forgiveness. This tension underlies the conflicting conceptions of the human with which we began this chapter. Gilligan argues that these discrete experiences give rise to two different moral languages: a language of rights that justify separation, and a language of responsibility that sustains relationship. A focus on the first language at the cost of the second opens the way to manipulation, exploitation and the rationalization of hurt.

Gilligan's account provides a timely reminder of the dual nature of our Christian inheritance, especially since the Reformation: in Christian language, the life of faith is *both* corporate and individual. The Christian life is to be lived in community, but it is a life to which individuals as well as communities are called and in which individual conscience is respected. Clearly, there is a tension between these two pillars. The individualistic aspect of Christian belief, including belief in an individual soul has been translated into our current secular emphasis on individualism, both as an explanatory mechanism and a normative ideal, through the Enlightenment and subsequently through our Liberal traditions.

While rejecting his account Kohlberg's emphasis on the role of moral reasoning serves to reminds us that social norms *are* subject to reflection, criticism and revision. Clearly moral philosophers play a role in that reflection, criticism and revision, but their speculations are also based on the ideas and circumstances of their societies. They help crystallise those ideas.[87] Recent emphasis on the individual has led, however, to

considerable neglect of the social side of that reflection and of human life more generally.

## CONCLUSION

This chapter started off by pointing to the influence of the economics profession and what is called 'economic rationalism' on public policy as being a cause of some concern. The Australian Fair Trading Debate, a policy debate that has extended over the last twenty-five years, is a contemporary policy debate that raised fundamental questions bearing on the functioning of the capitalist system and the relationship between economics, ethics and the law. Thus it provides an ideal vehicle to explore the influence of economic ideas on a fundamental legal institution. It is suggested that economic rationalists have introduced two key, but hidden assumptions into that debate, the autonomy of market institutions and the primacy of the economic system over the social. It is argued that as a consequence the vocabulary of economics with all its entailments now provides the dominant vocabulary for the evaluation of public policy choices.

In order to examine those assumptions the thesis has commenced with an examination of the basis of social order starting from a position that sees the individual embedded in society. Thus it considers that that there is no such thing as a pre-social human nature and that the formation of our values and even of our consumer preferences is a thoroughly social process. In support of this it points our earliest hominoid ancestors as having lived as members of social groups and of our evolution as involving a complex in which the organised hunting of large animals, life in organised social groups and the making and use of tools were interconnected. Thus it sees the evolution of the human body as being inseparable from the evolution of human culture. That culture is something we learn as children discovering how our parents and those around us interpret the world. This evolved social order is widely acknowledged to be a moral order, an order that determines how we should act. The study of social life is therefore the study of social norms and the institutions in which they are embodied, not simply regularities in conduct but regulated conduct. These regulations set limits to, and works

against, the drives that we have inherited. It is argued, in particular, that its is the control of greed broadly defined which constitutes a crucial victory of culture over animality, a victory which permitted complex organisations to emerge. Central to this view is the idea that human beings as they have evolved created the social system in which they have their being. This evolution of human culture was not a once and for all process but is an on going process.

The maintenance of any social order then involves a moral struggle between individuals and between individuals, a struggle to control our behavioural tendencies to dominate, to compete, and to be aggressive. But there are severe limits to our successful control of these tendencies. This fact has been widely acknowledged throughout human history, in widely differing cultures, particularly in the context of religious teachings. In particular it is reflected in the Christian doctrine of original sin, a doctrine that was secularised by Hobbes in his war of all on all, and then largely forgotten. But it is a doctrine that incorporates a profound insight into the human condition, an insight which we ignore to our peril particularly in the design of our institutional and organisational arrangements. It is unorganised social pressure, organised enforcement of law and our own sense of guilt flowing from any breach of internalised norms that provides the moral coercion that permits the social system to survive.

It has been noted in passing that such an evolutionary account of the existence of the social order will not seem a satisfactory account to some theorists who will be looking for an ahistorical account analogous to the theoretical accounts given in the physical sciences. While doubts are entertained about the value of such accounts, and no dominant theory has emerged, a brief overview has been given of the types of theories being advanced in contemporary discourse. It is concluded, however that there is no need to adopt an unicausal approach, and that all of the accounts discussed provide some insight into the human condition. Of particular importance is the account given by Jon Elster, who has concluded that the social norms cannot be reduced to any single principle, and, in particular, cannot be reduced to rationality or any other form of optimising mechanism. This brief survey of competing theories ends with an account of the approaches of prominent development psychologists, who have attempted a more

empirical approach based on the moral development of children. In particular, Kohlberg's unitary, rationalist conception of morality as justice is discussed and discounted as not providing a convincing account. Gillian's alternative account of the moral development of children suggests that moral development proceeds along two different but intersecting paths that run through different modes of experience and give rise to different forms of thought, an analytical logic of justice and an ethic of care.

In any event it is clear that no society can survive without stable moral traditions backed up by effective means of coercion. However our day-to-day moral vocabulary derives from several different and incompatible moral tradition. Consequently, the moral foundations of modern society are incoherent and fragmented. This would seem to poses a significant threat to that social system and some commentators have sensed a deterioration in the social, intellectual and philosophical capital of the Western civil order.

Having concluded that human civilisation is always under threat from what used to be called human sinfulness, including human greed, the next Chapter will continue the examination of the assumptions that underlie much contemporary policy debate which this chapter commenced, ie the assumption of the autonomy of the economic system and the primacy of the economic over the social. That Chapter will examine the relationship between the economic system and the social order that has just been discussed. It will suggest that the economic system, like society itself, is also a social artefact and, far from being autonomous, is dependent on the systems of social control discussed above.

## Notes

[1] Augustine, St, 1972, City of God, Book IV, Chapter 5, Section 4, Pelican Classics, p139

[2] Pusey, M, 1991, Economic Rationalism in Canberra, Cambridge University Press, Melbourne, p6

[3] see Malthus, Thomas, 1973, in Leonard D Abbott, ed, Masterworks of Economics, vol1, McGraw-Hill, 1973, p260 and Kenneth Lux, 1990, Adam Smith's Mistake, How a Moral Philosopher Invented Economics and Ended Morality, Shambhala, Boston,

[4] Lux, 1990, p42, citing Rajani J Kanth, 1986, Political Economy and Laissez-Faire, Rowman & Littlefield, Totowa NJ, p88

[5] To be fair to Ricardo, it should be noted that he was talking about the incentive then existing for employers to underpay their employees in the expectation that the poor laws would supplement their wages so as to provide those employees with the minimum for subsistence. However, Cowherd has shown that the increased costs of relief that was the source of these concerns was the result of increased unemployment following the end of the Napoleonic Wars and not the Poor Laws themselves. See Raymond D Cowherd, 1977, Political Economists and the English Poor Laws, Ohio University Press, Athens

[6] Walker, E Ronald, From Economic Theory to Policy, The University of Chicago Press, Chicago, 1943, Ch 1

[7] Pusey, 1991 and Michael Pusey, 1993, Reclaiming the Middle Ground, Discussion Paper No 31, Public Sector Research Centre, The University of New South Wales, Kensington

[8] Markoff, J, Montecinos, V, The Ubiquitous Rise of Economists, Journal of Public Policy, 13, I, 37-68, 1993

[9] see Whitwell, Greg, 1986, The Treasury Line, Allen & Unwin, Sydney. As Pusey, 1991 notes Australia has a relatively small public sector, low taxation and public expenditure and low levels of welfare expenditures.

[10] Pusey 1991 points to social selection and social background as a key mechanism. The author, on the basis of nearly thirty years experience in policy positions within 8 policy Departments, agrees, emphasising the top-down control exercised over the selection process for SES officers, and the tendency for senior bureaucrats to 'clone' themselves and their views in making selections for such positions. This has a flow effect at lower levels. The result has been substantial pressure for conformity, and the exclusion of the more outspoken critics of economic rationalism from senior positions.

[11] The possibility of tax increases to cover the budgetary shortfall does not seem to have been canvassed, certainly not publically.

[12] Pusey, 1991, p11

[13] Phillips, Derek L, 1986, Towards a Just Social Order, Princeton University Press, Princeton,

[14] Schwartz, Barry, 1986, The Battle for Human Nature, Science, Morality and Modern Life, WW Norton & Company, New York

[15] Bruck, Michael von, 1986, The Unity of Reality, trans James V Zeitz, Paulist Press, New York,

[16] Stark, Werner, 1978, The Social Bond, An Investigation into the Bases of Law-abidingness, Vol II, Antercedents of the Social Bond, The Ontogeny of Sociality, Fordham University Press, New York, p66

[17] Stark, Werner, 1983, The Social Bond, Vol IV, Safeguards of the Social Bond, Ethos and Religion, Fordham University Press, New York, p191

[18] Simons, Robert G, 1995, Competing Gospels, Public Theology and Economic Theory, E J Dwyer, Alexandria,

[19] Rabinow, Paul, 1983, Humanism as Nihilism, in Norma Haan et al, Social Science as Moral Inquiry, Columbia University Press, 1983

[20] Hodgson, Geoffrey M, 1994, The Return of Instititional Economics, in Smelser, Neil J and Swedberg, Richard,eds, The Handbook of Economic Sociology, Russell Sage Foundation, New York

[21] Emmet, Dorothy, 1966, Rules and Relations, Macmillan, London, p122

[22] Granovetter, Mark, 1991, The Social Construction of Economic Institutions, in Amitai Etzioni and Paul R Lawerence, Socio Economics, Towards a new Synthesis, M E Sharp, New York,

[23] McPherson, Michael S, 1983, Want Formation, Morality, and Some "Interpretive" Aspects Of Economic Inquiry, in Norma Haan et al, Social Science as Moral Inquiry, Columbia University Press, New York.

[24] Boulding, Kenneth E, 1970, Economics as Science, McGraw-Hill, New York

[25] Toulmin, Stephen, 1990, Cosmopolis, The Free Press, New York.

[26] Keesing, Roger M, 1981, Cultural Anthropology, A Contemporary Perspective, Holt, Rinehart and Wilston, second edition, Fort Worth,

[27] Keesing, 1981, p16

[28] Keesing, 1981, p21

[29] Keesing, 1981, p22

[30] Keesing, 1981, p28

[31] Fukayama, Francis, 1995, Trust, The Free Press, New York, p34

[32] Fukayama, 1995, p34

[33] Spradley, James P and McCurdy, 1994, Conformity & Conflict, Readings in Cultural Anthropology, eighth edition, Davis W, Harper Collins College Publishers, New York

[34] Spradley & McCurdy, 1994, p69

[35] Durkheim, Emile, 1993, The Division of Labor in Society, Trans, George Simpson, The Free Press, New York, pps 227-228

[36] Emmet, Dorothy, 1966, Rules, Roles and Relations, Macmillan, London

[37] Spradley & McCurdy 1994

[38] Stark, Werner, 1976, The Social Bond, Vol I, Antecedents of the Social Bond, The Phylogeny of Sociability, Fordham University Press, New York,

[39] Stark, Werner, 1983, The Social Bond, Vol IV, Safeguards of the Social Bond, Ethos and Religion, Fordham University Press, New York,

[40] Sahlins, M D, 1960, The Origin of Society, Scietific American, 203, No 3, September, pp77-86

[41] Hume, David, 1966, Treatise of Human Nature, Claredon Press, London, pp187-205

[42] Stark, 1983

[43] Campbell, Lewis and Benjamin Lowett, 1987, Plato's Republic, Garland, New York

[44] Stark, 1978, p198

[45] Frowen, Stephen F, ed, 1997, Hayek: Economist and Social Philosopher, A Critical Retrospect, Macmillan, London

[46] Williamson, Oliver E, 1994, Transaction Cost Economics and Organizational Theory, in Smelser, Neil J and Swedberg, Richard , eds, The Handbook of Economic Sociology, Princeton University Press, Princeton, NJ,

[47] Williamson, 1994,

[48] Reynolds, Peter C, 1981, On the Evolution of Human Behavior: the argument from animals to man, University of California Press, Berkeley

[49] Stark, 1976

[50] Ross, E A, 1901, Social Control, Macmillan, London, p190

[51] The Bhagavadgita, translated by S. Radhakrishnan, Harper Torchbooks, New York 1973.

[52] Romans 7: 14 - 20

[53] Bruck, Michael von, 1986, The Unity of Reality, trans James V Zeitz, Paulist Press, New York,

[54] Tracey, David, 1976 Chicago University Lectures, as reported by Edwin Byford, private communication

[55] Tracey, David, 1996, Blessed Rage for Order, Seabury Press, New York,

[56] Of course, mainstream contemporary Christianity would interpret the story of the fall as myth rather than as history. The story of the Fall in Genesis is not a historical account of the origin of human sinfulness, but rather as an expression of the insight that sin originates in human pride and self-will.

[57] Tillich, Paul,1963, Systematic Theology Vol III, University of Chicago Press, p93

[58] John Paul II, 1995, Centesimus Annus, St Paul Publications, Sydney, p77

[59] Simon, 1995

[60]Hobbes, Thomas, 1968, [1651], Leviathan, Pelican Classics, London, Chapter XIII, p186

[61]Rousseau, Jean-Jacques, 1975, The Social Contract, Penguin Books, London

[62] Nielbuhr, Reinhold, 1944, The Children of Light and Children of Darkness, Charles Scribner and Sons, New York, pp 10-11

[63] Stark, Werner, 1978, The Social Bond, Vol II, Antecedents of the Social Bond, The Ontogeny of Sociality, Fordham University Press, New York, p124

[64] Llewellyn, Karl N, 1931/32, What Price Contract, Yale Law Journal No 40, pps704-751

[65] Stark, 1978, p201

[66] Stark and Sumner believe that class-dividedness, and even class-warfare can be fully accommodated within the framework of their analysis. Stark agrees that each class or group in society has its own mores and that the upper strata tend to force their own customs on the lower strata. Indeed, he acknowledges that chiefs, kings, priests, warriors, statesmen and other functionaries have often used their authority to promote their own interests. In any event, there is no need for us to deny the possibility that dominance played a role in the historical processes which created societies and states. And, of course, it would be entirely consistent with Stark, and with the liberal tradition, to argue that our desire to acquire such dominance requires control. Indeed, the coercive nature of social control necessarily raises the question of the legitimate limits of such cohesion, a question of central concern for this analysis.

[67] Dunstan, G R, 1974, The Artifice of Ethics, The Moorhouse Lectures 1973, SCM Press, London,

[68] See for Example, Senge, Peter, M, 1992 The Fifth Discipline, Random House, Milsons Point

[69] Dunstan 1974

[70] Dunstan 1974

[71] Emmet, 1966

[72] Gerth and Mills, 1954, Character and Social Structure, Routhledge & Kegan Paul, London

[73] see Dunstan, 1974 and Emmet, 1966

[74] Downie, R S, 1972, Roles and Values, An Introduction to Social Ethics, Methuen & Co Ltd, London

[75] Downie, 1972,

[76] Brennan, Geoffrey and James M Buchanan, 1985, The Reason of Rules, Cambridge University Press, Cambridge

[77] see Phillips, Derek L, 1986, Towards a Just Social Order, Princeton, New Jersey for a summary of contemporary theories.

[78] Parsons, Talcott, 1949, Essays in Sociological Theory: Pure and Applied, Free Press, Glencoe, Ill, p203

[79] Elster, Jon, 1989, The Cement of Society, Cambridge University Press, Cambridge

[80] Elster, 1989, p285

[81] Marx, Karl and Frederick Engles, 1970, The German Ideology, International, New York, Preface

[82]Gilligan, Carol, 1982, In a Different Voice, Harvard University Press, Cambridge, Mass

[83] Phillips, 1986

[84] Phillips, 1986

[85] Toulmin, Stephen, 1990, Cosmopolis, The Free Press, New York

[86] Gilligan, Carol, 1983, Do the Social Sciences have an adequate theory of Moral Development?, in Norma Haan, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, Social Science as Moral Inquiry, Columbia University Press, New York,

[87] Downie, 1972

## CHAPTER 3: THE RELATIONSHIP BETWEEN THE ECONOMIC SYSTEM AND THE SOCIAL ORDER

> *Is society mainly a market place, in which self-serving individuals compete with one another – at work, in politics, and in courtship – enhancing the general welfare in the process? Or do we typically seek to do both what is right and what is pleasurable, and find ourselves frequently in conflict when moral values and happiness are incompatible? Are we, first of all, "normative-effective" beings, whose deliberations and decisions are deeply affected by our values and emotions.* Amitai Etzioni[1]

### INTRODUCTION

The previous chapter commenced to examine two key, but hidden assumptions, which have underpinned much recent public policy formulation, the ideas that the economic system is autonomous and that the economic system has priority over the social system. These two assumptions have played a central role in recent public policy discussion on the issues of Fair Trading in Australia. That debate involves fundamental questions relating to the functioning of the capitalist system and the relationship between economics, ethics and law. Consequently, the Fair Trading Debate provides an ideal vehicle for exploring the influence of economic ideas on a fundamental legal institution. In fact these the two assumptions critically determine how the Fair Trading Debate is viewed by key players in that debate. More broadly these two assumptions have allowed economics to become the dominant methodology and vocabulary for the evaluation of public policy choices in our society. As a result 'economic efficiency' has become the dominant value served by government policy.

The discussion so far has centred around the question of how social order originates. It has been shown that there is broad consensus that the social order is a moral order that developed with the evolution of the human race. Thus it was concluded that there was no pre-social human nature, and consequently the study of social life involves the study, not simply of regularities, but the study of regulated conduct. It is our shared values that acts as the mortar that binds together our communities, backed by formal and informal means of coercion and by our own sense of guilt. Importantly, it is the control

of our greed that constitutes one of the prime victories of culture over our animality. But that victory is less than complete and consequently the maintenance of a peaceful society involves constant moral struggle. Consequently, it was concluded that in an effective civil society the pursuit of individual and institutional choice and 'self-interest' is heavily constrained both by internalised moral codes and by externally imposed social sanctions. It was also concluded that that order was constantly under threat from what used to be called human sinfulness, particularly human greed.

In this chapter, the discussion will focus the relationship of dependence between the economic and social systems, pointing to the neglect of this relationship by economic rationalists.

## NEGLECT OF THE DEPENDENCY OF THE ECONOMIC SYSTEM ON THE SOCIAL SYSTEM BY NEO-CLASSICAL ECONOMICS

This thesis disputes the assumptions that the economic system has temporal and conceptual autonomy and that the economic system has primacy over the social. Any complex exchange economy needs, and presupposes, an already existing state of general pacification in order to function. Such an economy and its associated institutions are not natural phenomena - they do not arise spontaneously[2]. They are social artefacts. Indeed the dichotomy between the social system and the economic system used here is, itself, a social artefact and is largely a product of the Scottish Enlightenment.

As Brennan and Buchanan confirm, most recent economists have tended to neglect the dependency of the economic system on the social system:

> "These economists have tended to neglect the importance of rules under the sometimes naive presumption that the 'market will out,' regardless of institutional constraints."[3]

Less charitably, it could be suggested that this neglect reflects the imperialist pretentiousness of the dominant neo-classical tradition in seeking to explain all social phenomena. These imperialist tendencies appear even among economists aware of the importance of social norms for the economic system. For example, Ben-Ner and Putterman[4] label religious prophets as "moral entrepreneurs" presumably on the basis

that the language of economic explanation is more 'scientific' and thus more privileged than the traditional religious description. Similarly, these tendencies can be seen in the recent attempts of economists to include our moral concerns within the framework of 'preferences' and thus within the framework of instrumental calculation. However, an economic approach to our moral values, based on the traditional self-interest model, is simplistic and misleading not simply because of the neglect of altruistic behaviour. Hirschman argues against the use of such a simplistic model of human behaviour:

> "What is needed is for economists to incorporate into their analyses, wherever that is pertinent, such basic traits and emotions as the desire for power and for sacrifice, the fear of boredom, pleasure in both commitment and unpredictibility, the search for meaning and community, and so on."[5]

Certainly, minor revisions to the neo-classical model such as allowing bounded rationality or allowing individuals to have altruistic preferences will not be enough to correct this form of modelling.[6] This is because it is simply not true that society consists of a set of independent individuals, each of whom acts to achieve goals that are independently arrived at, and that the functioning of the social system consists of the combination of these actions of independent individuals.[7] This billiard ball view is crudely derived from a number of interrelated influences. Firstly, the only perceptible actors in society are individuals.[8] Secondly, as we will see in subsequent chapters, the political and moral philosophers of the seventeenth and eighteenth centuries, Adam Smith and the other classical economists included, influenced by a mechanical cosmology, built such a view from the Reformation's emphasis on individual conscience. Thirdly, and largely as a consequence of the first two, individuals are more isolated in modern society than in the past. Nevertheless, in modern societies individuals still do not act independently, nor are their goals arrived at independently, and their interests are still not wholly selfish. The contemporary account of the individual as used in much moral and political philosophy and economics simply does not give a rich enough account.

As indicated above, the standard response to this argument is to claim that moral values are incorporated into individual preferences. However, this effectively denies the pervasive, conflicting, and regulatory influences of culture in an attempt to preserve the methodological individualism essential to neo-classical modelling and the primacy of

voluntariness essential to its normative use. As we have already argued in Chapter 2, morals are a community construct. It is the assumed conventional dichotomy between the individual and the group that is misleading. It eliminates the tacit, interactive, dynamic relationship between individuals and between those individuals and the cultures within which they are embedded. Indeed, treating values as a kind of preference is simply an ad hoc strategy to insulate that theory from falsification by eliminating its predictive power and rendering it empty. It also eliminates the distinction embedded in language between selfish and unselfish behaviour.[9] But the neglect of these considerations is central to the whole neo-classical research program. That program is strongly committed to explanation in terms of methodological individualism, reductionism, instrumental rationality, the Newtonian metaphor and its associated mathematic modelling, and self-interest as the fundamental social force. Indeed, the Newtonian metaphor, which is associated with a natural law outlook, is the dominant metaphor in contemporary economics. These constitute the neo-classical image of what it is to be properly 'scientific'. These commitments are fundamentally normative and misleading rather than positively scientific. Inherent in that commitment is a view of society as a social contract. This is not simply a result of the positivist movement in economics and philosophy for the best part of the twentieth century, but has deeper roots in the whole Enlightenment program about which more will be said in the next chapter. It provides a particularly good example of how a particular intellectual paradigm or tradition locks us in to a particular way of looking and discussing.

While contemporary neo-classical economists have largely neglected the relationship between the economic and social systems, this is not true more generally. It is to the discussion of that relationship by prominent theorists to which the thesis now turns.

**What has been said by others who have not neglected the issue**

The neglect noted above is surprising given the extent of the discussion of the relationship between the social and economic systems since the time of Adam Smith. Smith was well aware of the dependency of the economic system on legal rules and institutions. For example, in *The Wealth of Nations*, he says:

> "only under the shelter of the civil magistrate that the owner of that valuable property which is acquired by the labour of many years or perhaps of many successive generations, can sleep a single night in security."[10]

Earlier in *The Theory of Moral Sentiments* he wrote that the individual

> "in the race for wealth and honours and preferments . . . may run as hard as he can, and strain every nerve and muscle, in order to outstrip his competitors. But if he should jostle or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair-play, which they cannot admit of."[11]

And Smith recognised that justice is less a product, than a producer, of permanent human interaction, a presupposition as much as a consequence of the experience of interchange and cooperation. Indeed, Robins, in talking about Smith's views, suggested that the "invisible hand" is "the hand of the law-giver, the hand which withdraws from the sphere of the pursuit of self-interest those possibilities which do not harmonize with the public good."[12] Nevertheless Smith was also a Newtonian, seeing the economic system and the social order as an equilibrium system involving two fundamental social forces, self-interest and sympathy. Thus Smith under the influence of his friend David Hume could be seen as the father of the application of the Newtonian metaphor to economic analysis, just as earlier Hobbes was the father of the application of the Newtonian metaphor to political theory.

In his analysis, Marx pointed out that commodities do not go to the market and make exchanges on their own account. For Marx, value was not inherent in a commodity but was rather a relation between persons expressed as a relation between things. Consequently, Marx emphasised that the market consisted of social relationships. Nevertheless, Marx, in his *A Contribution to the Critique of Political Economy*, claimed that the economy constitutes the 'real foundation' of society, and on this foundation 'the legal and political superstructure' is based.[13] In other words, the moral 'superstructure' of a society is adapted to its sociotechnical or economic 'substructure'. In *Capital*, Marx claims to lay bare the 'natural laws' of capitalist production, and is guilty of the same error as the bourgeois economists he criticised, the reification of economic categories and their elevation into universal laws.

In contrast, the economic sociology tradition regards the economic process as an organic part of society, constantly interacting with other forces.[14] Weber, for example, sees economic action as social and emphasises the autonomy of the social orders, law, politics and religion, vis-a-vis the economy. In opposition to Marx, he argued that it was not underlying economic forces that created cultural products like religion and ideology, but rather culture that produced certain forms of economic behaviour.[15] In *The Protestant Ethic and the Spirit of Capitalism*,[16] he argued that the early Puritans, in seeking to glorify God alone and in renouncing the acquisition of material goods as an end in itself, developed certain virtues like honesty and thrift that were extremely helpful to the accumulation of capital. Weber went on to argue that the reinforcement of social virtues like honesty, reliability, cooperativeness, and a sense of duty to others, had the effect of heightening the capacity of adherents to cohere in new communities.[17] This was helpful to economic development because small sectarian communities created natural networks through which businessmen could hire employees, find customers, open lines of credit, and the like. Nevertheless, Weber saw market exchange as exceptional in that it represented the most instrumental and calculating type of social action that was possible between human beings. For Emmet,[18] the fruitful way of interpreting Weber's views is in terms of the mutual conditioning of one by the other, and this is consistent with the organic outlook of contemporary economic sociology.

For Durkheim, the division of labour serves a much broader function than the creation of wealth and efficiency.[19] For him, it is the principal vehicle for creating cohesion and solidarity in modern society. As the division of labour advances, people cease to bond together on the basis of their similarities (what he called mechanical solidarity) but on the basis of the duties and rights arising out of the interdependency produced by the division of labour (organic solidarity). It is these duties and rights that hold society together. Consequently, morality was central to the whole cohesion of society. Durkheim went on to argue that a whole structure of norms and regulations surround economic exchanges and make them possible. In particular, without some generally shared feelings about honest dealings, contracts would be unenforceable.

Durkheim insisted that even a well-functioning exchange economy was in constant danger of being hollowed out by fraud and force. Indeed, Durkheim in his preface to the second edition of *The Division of Labor in Society* published in 1902, was

concerned about the state of juridical and moral anomy [lawlessness], which attended economic life in his day:

> "The most blameworthy acts are so often absolved by success that the boundary between what is permitted and what is prohibited, what is just and what is unjust, has nothing fixed about it, but seems susceptible to almost arbitrary change by individuals. An ethic so unprecise and inconsistent cannot constitute a discipline . .
>
> "That such anarchy is an unhealthy phenomenon is quite evident, since it runs counter to the aim of society, which is to suppress, or at least to moderate, war among men, subordinating the law of the strongest to a higher law. To justify this chaotic state, we vainly praise its encouragement of individual liberty. Nothing is falser than this antagonism too often presented between legal authority and individual liberty. Quite on the contrary, liberty (we mean genuine liberty, which it is society's duty to have respected) is itself the product of regulation. I can be free only to the extent that others are forbidden to profit from their physical, economic, or other superiority to the detriment of my liberty. But only social rules can prevent abuses of power. It is now known what complicated regulation is needed to assure individuals the economic independence without which liberty is only nominal.
>
> "If in the task that occupies almost all our time we follow no other rule than that of our well-understood interest, how can we learn to depend upon disinterestedness, on self-forgetfulness, on sacrifice? In this way, the absence of all economic discipline cannot fail to extend its effects beyond the economic world, and consequently weaken public morality."[20]

Polanyi takes up much the same theme. For him the human economy was embedded and enmeshed in institutions, economic and non-economic. The latter were vital.[21] Consequently, Polanyi objected to what he called the economistic fallacy of equating the whole of the economy with the market. By doing so the true nature of the economy is distorted. In *The Great Transformation*,[22] Polanyi disputed Adam Smith's claim that humans had a natural propensity to truck and barter. In *The Economy as an Instituted Process*,[23] he argued that historically there were several different ways of organising an

economy: through reciprocity, redistribution, and exchange or a combination of all three. Even within markets, prices that fluctuate frequently, due to competition, represented a fairly late stage of development

Thus the market economy was an institutional structure that was insignificant up to recent times. Nevertheless, the division of labour was a phenomenon as old as society and sprung from differences inherent in the facts of sex, geography, and individual endowment. Polanyi believed that historical and anthropological research justified the view that the economy is, as a rule, submerged in social relationships. Economic actors do not act to safeguard their individual interests in the possession of material goods but to safeguard their social standing, claims, and assets. Material goods are valued only in so far as they serve this end. In tribal society, an individual's economic interest is rarely paramount as the community keeps its members from starving. It is the maintenance of social ties, on the other hand, that is crucial. Disregarding the accepted code of behaviour would involve cutting oneself off from one's community. In any event, in the long run all social obligations are reciprocal and serve the individuals long-term interests. In a society characterised by reciprocity, the idea of profit is barred and haggling is decried while freely giving is acclaimed as a virtue. As Polanyi said:

> "Broadly, the proposition holds that all economic systems known to us up to the end of feudalism in Western Europe were organized either on the principles of reciprocity or redistribution, or householding, or some combination of the three. These principles were institutionalized with the help of a social organization which, inter alia, made use of the patterns of symmetry, centricity, and autarchy. In this framework, the orderly production and distribution of goods was secured through a great variety of individual motives disciplined by general principles of behavior. Among these motives gain was not prominent. Custom and law, magic and religion co-operated in inducing the individual to comply with rules of behavior which, eventually, ensured his functioning in the economic system."[24]

Consequently, Polanyi believed that what economists saw as the typical market was just one of many possible forms of organised exchange. To Polanyi, two watershed events in European history were responsible for the emergence of the modern market economy: the creation by the mercantilist state of "internal markets" and the radical elimination of

all market regulation beginning in the early nineteenth century in England. To him the result was unspeakable misery for the common people until actions were finally taken to protect society from "the self-regulating market." Indeed he traces many of the key tragic events of the twentieth century to the radically utopian attempt in mid-nineteenth century England to transform all of society into one giant market.

For Polanyi, the control of the economic system by the market has overwhelming consequences for the organisation of society; it means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the social system. Indeed, a self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere. To include human beings (labour) and their natural surroundings in the market system is to subordinate the substance of society itself to the market. Consequently for Polanyi, a market economy can exist only in a market society. Indeed, the very idea of a self-adjusting market implied a stark utopia. He believed that such an institution could not exist for any length of time without annihilating the human and natural substance of society.[25]

Interestingly, Hayek, a strong supporter of market processes and a minimalist state in his later writings, makes it clear that what he had called the 'spontaneous' order of the market was dependent on the system of abstract rules, deep-rooted convictions and moral rules, which are the product of civilisation and which represented the institutional infrastructure of the economic system.[26] Indeed, for Hayek, informal rules such as custom and conventions are probably even more important in daily economic life than the formal ones. Hayek was conscious of the complexity of that social system arguing that:

> "No single human intelligence is capable of inventing the most appropriate abstract rules because those rules which have evolved in the process of growth of society embody the experience of many more trials and errors than any individual mind could acquire."[27]

Another more recent economist to write on the issue was Granovetter. He argues that economic institutions, like all institutions, do not arise automatically in some form made inevitable by external circumstances, but are socially constructed.[28] They are

constructed by individuals whose action is both facilitated by and constrained by the structure and resources available in the social networks in which they are embedded. Just as for firms and economic groups, how industries are organised is a social construction that often might have been otherwise. He also reminds us that economic action, like all action, is socially situated, and cannot be explained by individual motives alone; it is embedded in ongoing networks of personal relations rather than carried out by atomised actors. Like Polanyi, he points out that the pursuit of economic goals is accompanied by such non-economic goals as sociability, approval, status, and power.

Indeed, while much economic literature focuses attention on the role of our mortal codes in permitting the exchanges involved in any complex division of labour, we would do well to remind ourselves that most economic activity occurs in groups, and without an effective social order, no large-scale group activity would be possible. Collectives are the important decision-making units in contemporary society. Consequently, Simon finds it puzzling that neoclassical economics places markets at the centre of the stage with all economic phenomena, all social phenomena, to be explained by translating them into, or deriving them from, market transactions based upon negotiated contracts.[29] In criticising this approach, Simon points to the absence of adequate empirical testing and an absence of an adequate consideration of the literature on organisations and decision-making. Because organisations are the dominant feature of the economic landscape, Simon suggests that the term 'organisational economy' might be a more appropriate description than 'market economy'.[30] He also points out that the boundary between markets and organisations varies greatly from one society to another and from one time to another, arguing that these variations need to be explained. Further, he argues that we should begin with empirically valid postulates about what motivates real people in real organisations, pointing to four well documented organisational phenomena, authority, rewards, identification and coordination. Consequently, for Simon, prices are only one of the mechanisms for the coordination of behaviour, either between organisations or within them.

North approaches this issue from the perspective of an economic historian interested in explaining economic growth and the differential performances of economies. In *Institutions, Institutional; Change and Economic Performance*,[31] he argues that a proper

understanding of the nature of human coordination and cooperation has been missing from economic analysis. While many economic historians emphasise the role of technological innovation in the development of human society and in economic growth, North places his emphasis on the development of institutions. He defines those institutions as the humanly devised constraints that shape human interaction and this brings us back into the sociological stream discussed earlier. North sees human cooperation as a fundamental theoretical problem that needs to be explained because complex, impersonal exchange is the antithesis of the condition under which cooperation arises from rational self-interest in game theory. In any event, he sees a vast gap between the relative clean, precise, and simple world of game theory and the complex, imprecise, and fumbling way by which human beings have gone about structuring human interaction. He also now disputed that evolutionary pressures will lead to institutions that are "efficient" in the neo-classical sense. He also points out that historically the growth of economies has occurred within the institutional framework of well-developed coercive polities because it is difficult to sustain complex exchange without a third party to enforce agreements.

The difficulty in enforcing agreements has always been the critical obstacle to increasing specialisation and division of labour. Enforcement poses no problem when it is in the interests of parties to live up to an agreement. But without institutional constraints, self-interested behaviour will foreclose complex impersonal exchange, because of the uncertainty that either party will find it in their interest to live up to an agreement. Transaction costs will reflect this uncertainty by including a risk premium, the magnitude of which will turn on the likelihood of defection. North argued that throughout history the size of this premium has been too large to allow complex impersonal exchange and has therefore limited the possibilities for economic growth.

For North, it has been the evolution of institutions that has limited these costs and in the process created a hospitable environment for the complex exchange necessary for economic growth. Uncertainties surround such complex exchange. They arise as a consequence of both the complexity of the problems to be solved and our limited problem-solving abilities. In all societies, from the most primitive to the most advanced, people impose constraints upon themselves to give a structure to their relations with others. In these circumstances, history matters because the past and the

present and the future are connected to the past by the continuity of a society's institutions. Consequently, today's and tomorrow's choices are shaped by the past.

Such institutions include both formal rules and informal constraints such as convention and codes of behaviour. Institutional constraints include both what individuals are prohibited from doing and under what conditions some individuals are permitted to undertake certain activities. The rules and informal codes are sometimes violated and punishment is enacted. Therefore, an essential part of the functioning of institutions is the costliness of ascertaining violations and the severity of punishment. Taken together, the formal and informal rules and the type and effectiveness of enforcement shape the whole character of the social and economic system. Institutions affect the performance of the economy by their effect on the costs of exchange and production. Together with the technology employed, they determine the transaction and transformation costs that make up total costs.

In the course of his analysis, North makes a crucial distinction between institutions and organisations. While organisations, like institutions, provide a structure to human interactions, he differentiates the rules from the players. Both what organisations come into existence and how they evolve are fundamentally influenced by the institutional framework. In turn, they influence how the institutional framework evolves. Indeed, such institutions (from conventions, codes of conduct, and norms of behaviour to statute law, and common law, and contracts between individuals) are evolving and are continually altering the choices available to us. Such evolution is a complicated process usually involving incremental change. Even discontinuous changes (such as revolution and conquest) are never completely discontinuous because of the embeddedness of informal constraints in societies. Although formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies. These cultural constraints connect the past with the present and the future and provide a key to explaining the path of historical change.

The institutions necessary to accomplish economic exchange vary in their complexity, from those that solve simple exchange problems to ones that extend across space and time and numerous individuals. The greater the specialisation and the number and

variability of valuable attributes associated with a good or service, the more weight must be put on reliable institutions that allow individuals to engage in complex contracting with a minimum of uncertainty. Exchange in modern economies consisting of many variable attributes extending over long periods of time necessitates institutional reliability, which has only gradually emerged in Western economies. North believes that formal rules make up only a small, although very important, part of the constraints that shape choices in those economies. In our daily interaction with others, whether within the family, in external social relations, or in business activities, the governing structure is overwhelming defined by codes of conduct, norms of behaviour, and conventions. Underlying these informal constraints are formal rules, but these are seldom the obvious and immediate source of choice in daily interactions.

It is clear that exchange is not simple in tribal societies. In the absence of the state and formal rules, a dense social network leads to the development of informal structures with substantial stability. Indeed, informal constraints are pervasive features of modern economies as well. These informal constraints involve extensions, elaborations, and modifications of formal rules, socially sanctioned norms of behaviour; and internally enforced standards of conduct. Cooperative frameworks of economic and political impersonal exchange are at the heart of social, political and economic performance. While formal rules can help, it is the informal constraints embodied in norms and internally imposed codes of conduct that are critical. In short North[32] does not believe that the rational choice paradigm can explain the historical and contemporary record of economic growth.

In a complementary account, Fukayama[33] also sees what he calls spontaneous sociability as critical to economic life. His view of the role of moral values in promoting organisational innovation and economic development owes much to the earlier work of Weber and Polanyi. Communities of shared values, whose members are willing to subordinate their private interests for the sake of larger goals of the community, alone can generate the kind of social trust that is critical to organisational efficiency. Consequently, the ability to create large, private business organisations in such societies as Germany, Japan, and the United States is related to the fact that they are high-trust societies with abundant social capital

Echoing North's[34] and Williamson's[35] focus on transaction costs, Fukayama argues that widespread distrust imposes a kind of tax on all forms of economic activity, a tax that high-trust societies do not have to pay. Justified expectations of honest conduct in transactions reduce costs incurred finding buyer or seller, negotiating a contract, complying with government regulations, and enforcing that contract in the event of dispute or fraud. There is less need to spell things out in lengthy contracts; less need to hedge against unexpected contingencies; fewer disputes, and less need to litigate if disputes arise. Indeed, in some high-trust relationships, parties do not even have to worry about maximising profits in the short run, because they know that a deficit in one period will be made good by the other party later. Importantly, a high-trust society can organise its workplace on a more flexible and group-oriented basis, with more responsibility delegated to lower levels of the organisation. Such a society will be better able to engage in organisational innovation, since the high degree of trust will permit a wide variety of social relationships to emerge. Workers usually find their workplaces more satisfying if they are treated like adults who can be trusted to contribute to their community rather than like small cogs in a large industrial machine designed by someone else. On the other hand, low-trust societies must fence in and isolate their workers with a series of bureaucratic rules. Consequently, the ability of companies to move from large hierarchies to flexible networks of smaller firms will depend on the degree of trust and social capital present in the broader society. This is important in contemporary discussions of the development of electronic commerce and the associated possibility of creating virtual organisations using new communications technology. A low-trust society may never be able to take full advantage of the efficiencies that these developments offer.

Fukayama argues that the most effective organisations are based on communities of shared ethical values.[36] Such communities do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis for mutual trust. In this regard, Williamson warns us against seeing trust in purely calculative terms, as to do so can have corrosive effects on the relationships involved[37]. Groups can enter into a downward spiral of distrust when trust is repaid with what is perceived as betrayal or exploitation.

Fukayama, like Stark and Weber, points out that traditional religions, or ethical systems like Confucianism, constitute the major institutionalised sources of such culturally determined behaviour because their shared moral languages give their members a common moral life. To some extent any moral community, regardless of the specific ethical rules involved, will create a degree of trust among its members. Certain ethical codes tend to promote a wider radius of trust than others do by emphasising the imperatives of honesty, charity, and benevolence towards the community at large.

Fukayama continues his discussion in terms of social capital which he defines as a capability that arises from the prevalence of trust in a society or in certain parts of it. Social capital differs from other forms of human capital insofar as it is usually created and transmitted through cultural mechanisms like religion, tradition, or historical habit. The social capital needed to create this kind of moral community cannot be acquired, as in the case of other forms of human capital, through a rational investment decision. Rather, it requires habituation to the moral norms of a community and the acquisition of virtues like loyalty, honesty, and dependability. The group, moreover, has to adopt common norms as a whole before trust can become generalised among its members. In other words, social capital cannot be acquired simply by individuals acting on their own. It is based on the prevalence of social rather than individual virtues.

Fukayama also argues that those societies with a high degree of communal solidarity and shared moral values should be more economically efficient than more individualistic ones. The larger organisations become, the greater the tendency is for individual members to become free-riders. The stronger the social solidarity, the more readily it is that members will identify their own well-being with that of the group and the more likely that they will put the group's interests ahead of their own. In the words of Kenneth Arrow:

> "Now trust has a very important pragmatic value, if nothing else. Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people's word. Unfortunately this is not a commodity that can be bought very easily. If you have to buy it, you already have some doubts about what you've bought. Trust and similar values, loyalty or truth-telling, are examples of what the economist would call 'externalities'. They are goods, they are commodities; they have real, practical,

> economic value; they increase the efficiency of the system, enable you to produce more goods or more of whatever values you hold in high esteem. But they are not commodities for which trade on the open market is technically possible or even meaningful."[38]

Indeed, Arrow goes on to argue that the whole economic system would break down if it were not for reinforcement agents and incentives based on morality. But Elster specifically rejects this as an adequate account of all social norms on the grounds that not all norms are Pareto improvements, some norms that would make everybody better off are missing, and the fact that a norm does make everybody better off does not explain why it exists.[39] The last of these would require the demonstration of a feedback mechanism in which the benefits of the norm to contribute to its maintenance. In this regard, Elster suggests that a form of social selection, as opposed to individual selection, could provide an adequate feedback mechanism. Similarly, Coleman[40] concluded that rational choice theory cannot explain the process by which norms are internalized. Furthermore, the psychologist Daniel Batson[41] has conducted a series of experiments which have gone a long way to disproving that all altruistic behaviour can be explained by the desire to avoid unpleasant feelings or self-punishment or to gain social approval, a sense of efficacy, or shared pleasure; a conclusion supported by field research.

In the light of the above, we would argue that our moral institutions as well as our legal institutions provide essential infrastructure for the social system in general and the economic system in particular. Although it has long been recognised that infrastructure is an essential part of the economic system, discussion of that infrastructure is mostly limited to physical infrastructure, a limitation associated with a very poor understanding of the concept of capital. Coleman[42]points to the properties of social capital that distinguish it from the private, divisible, alienable goods treated by neo-classical theory. Importantly, while it is a resource that has value in use it cannot be easily exchanged. Social capital is not the private property of any of the persons who benefit from it but is an attribute of the social structure in which a person is embedded. Social capital does not primarily benefit those whose efforts bring it into existence, but those who are part of the particular structure. The result is that most social capital is created or destroyed as a by product of other activities. It also means that the importance of social capital is

frequently unrecognised. Of course, the comprehensive legal framework for economic organisation, including property rights and contract, developed by complex societies, also form an essential part of that apparatus of social control and as such are an essential precondition to any complex division of labour - no one would argue that trust or moral obligation alone could take their place. These institutions are an essential part of any complex market system. But these institutions rest on a bedrock of ethical habits. As Durkheim argues, contracts, which appear to be voluntary calculated deals among uncommitted individuals, effectively draw on prior shared bonds which are not subject to negotiation, and of which the parties are often unaware.[43]

## CONCLUSION

Earlier it was argued that two key assumptions had been introduced into contemporary public policy debates by economic rationalists. These were the autonomy of the market and primacy of the market over the social. It has been argued that the complex exchange necessary to a highly specialised division of labour requires a pre-existing state of social peace. That state of peace is dependent on our evolved cultural systems with their informal norms and formal rules backed by formal and informal means of coercion and by our own sense of guilt at the breach of internalised norms. Consequently, the market is a sub-system nestled within a more encompassing societal context. But of course these systems are not independent of each other: they interact and condition each other. Indeed, social and economic institutions cannot be clearly distinguished.[44] Nevertheless, the process of economic competition is not self-sustaining; its very existence, as well as the scope of transactions organised by it, is dependent to a significant extent upon the societal "capsule", within which that competition takes place.[45] But the advocates of social contractual theory work with a model of society which is a replica of the market. Their attempt to model society's moral infrastructure as a social contract is an attempt to reduce all social phenomena to what is, itself, a particular social phenomenon. It is a contract which takes the simplest of transactions as its paradigmatic example.[46] But a simple exchange transaction provides only a poor model for complex long-term contracts. By trying to generate the rules of economic life internally, by viewing them as having emerged from rational, self-maximising individuals, such theorists have effectively assumed what they have set out to explain.

Such a view argues that our *long-term* interests require the capacity to discipline our appetites, the suppression of our animality, but this argument does no more than incorporate some of our moral values within the concept of *self-interest*. While it highlights the frequent presence of considerable tension between our immediate desires and our long-term interests, those long-term interests incorporate only some of our moral values. In any event, this concept of *self-interest* is not descriptive of the real behaviour of real individuals, amounting to no more than idealisations both of individuals and of their self-interest, idealisations which fly in the face of daily experience. In any event, as argued earlier, there is no historical basis for the view that fully formed individuals preceded communities and their shared rules, roles and beliefs. Indeed, contemporary society could not exist without the complex of social and religious norms which sustain it. The development of that society, indeed the formation of complex communities generally along with and their associated norms and institutions, has been a long process of social evolution along with the development of supporting religious and philosophical beliefs. Of course it can be said that this process of social evolution produced what amounts to a tacit social contact, but such an assertion would be mere sophistry, devoid of content.

This chapter has set out to examine two key assumptions underlying contemporary policy debates, the perceived autonomy of market institutions and the primacy of the economic over the social. These claims seem to reflect a too ready tendency to resort to dichotomous terms and to reductionism. They have been rejected on the basis that the suppression of our animality and our "self-interest" through social values, rules and socially defined roles play key roles in sustaining our social institutions and our economic system. And the proposition that 'self-interest' is the fundamental ordering principle operating in society has also to be rejected, and it has to be rejected even when self-interest is attenuated through competition. Indeed, the very claim is a scandal to those in the mainstream Christian tradition as well as to many other religious traditions.

The competition process itself is both constrained and sustained by social and legal rules. The complex division of labour in modern societies involves a complex of relationships and institutions, which cannot be reduced to transactions. Rather:

> "State, law and society are entwined in mutually reinforcing virtuous connection; rather than mutually reinforcing vicious competition. Or so it is when we are in luck."[47]

The next chapter will extend this examination of the perceived autonomy of market institutions and the primacy of the economic over the social. It will firstly focus on the history of the concept of the social contract and the associated doctrine of freedom of contract as the central paradigm in economic rationalism. It will also point to the growing difficulty encountered in trying to justify these theoretical ideas as the original Divine basis of Natural law was securalised and attempts made to naturalise it. This leads readily into the question of how economists perceive their own enterprise and how that enterprise fits in with the Enlightenment project.

## Notes

[1] Etzioni, Amitai, 1988, The Moral Dimension, Towards a New Economics, The Free Press, New York, pix

[2] Polanyi, Karl, The Great Transformation, 1971, Beacon Press, Boston

[3] Brennan and Buchannan, 1985, pp13-14

[4] Ben-Ner and Putterman, eds, 1998, Economics, Values and Organisations, Cambridge University Press, Cambridge

[5] Hirschman, Albert O, 1983, Morality and the Social Sciences: A Durable Tension, in Norma Haan, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, Social Science as Moral Inquiry, Columbia University Press, New York, p29

[6] Sugden, Robert, 1998, Normative Expectations, in Ben-Ner and Putterman, eds, 1998,

[7] Coleman, James S, 1990, Foundations of Social Theory, The Belknap Press of Harvard University Press, Cambridge, Mass.

[8] Coleman, 1990

[9] Mansbridge, Jane, 1998, Starting with Nothing, in Ben-Ner, Avner and Louis Putterman, eds, 1998,

[10]Smith, Adam, An Inquiry into the Nature and Causes of the Wealth of Nations, Book V, Chapter 1, cited Atiyah, P S, 1979, The Rise and Fall of Freedom of Contract, Clarendon Press, Oxford, p327

[11]Smith, Adam, Theory of Moral sentiments, ed Raphael and Macfie, p83, cited Atiyah, 1979, p327

[12]Robbins, L, Theory of Economic Policy in English Classical Political Economy, p56, cited Atiyah, 1979, p327. We might note in passing that the use of sporting analogies in describing economic competition remains popular to this day. But we might also note that it is the controlling set of rules and the mechanism of enforcement that makes such contests possible.

[13] Smelser, Neil J, and Richard Swedberg, 1994, The Sociological Perspective on the Economy in The Handbook of Economic Sociology, Neil J Smelser and Richard Swedberg eds, Princeton University Press, Princeton, NJ, 1994. This brief account of the views of the Economic Sociology school draws primarily on this reference.

[14] Smelser and Swedberg 1994,

[15] Fukayama, Francis, 1995, Trust, The Free Press, New York, 1995

[16] Weber, Max, 1930, The Protestant Ethic and the Spirit of Capitalism, trans T Parsons, Unwin Paperbacks London

[17] Weber, Max, 1978, Economy and Society, University of California Press, Berkeley

[18] Emmet, 1966, "In the long run, however, the consequences of the accumulation of wealth by ascetically minded business men made for an erosion of asceticism", p129

[19]Durkheim, Emile, 1993, The Division of Labor in Society, Trans George Simpson, The Free Press, New York, p3

[20] Durkheim, 1993, pp2-4

[21] Smelser, Swedberg, 1994, p15

[22] Polanyi, Karl, 1944, The Great Transformation , Rinehart, New York

[23] Polanyi, Karl, 1957, The Economy as an Instituted Process, reprinted in Mark Granovetter and Richard Swedberg, 1992, The Sociology of Economic Life, Westview Press, Boulder

[24] Polanyi, 1944, pp54-55

[25] Polanyi, 1944 p73

[26] Frowen, 1997

[27] cited Frowen 1997, p43

[28] Granovetter, M, Economic Action and Social Structure: The Problem of Embededdedness, Granovetter and Swedberg, 1992

[29] Simon, Herbert A, 1991, Organizations and Markets, Journal of Economic Perspectives, Vol 5, no 2, Spring, pp25-44

[30] Simon suggests that the choice of name may matter a great deal, and may strongly affect the choice of variables that are important enough to be included in any first-order theory of the phenomena.

[31] North, Douglass C, 1990, Institutions, Institutional Change and Economic Performance, Cambridge University Press

[32] North 1998, in Ben-Ner and Putterman, eds

[33] Fukayama, 1995

[34] North, 1990

[35] Williamson, 1994, Transaction Cost Economics and Organizational Theory, in Neil J Smelser and Richard Swedberg, The Handbook of Economic Sociology, Princeton University Press, Princeton

[36] Stark defines trust as the expectation that arises within a community of regular, honest, and cooperative behaviour, based on commonly shared norms, on the part of other members of that community.

[37] Williamson, 1994

[38] Fukayama, 1995, p151-152

[39] Elster, Jon, 1989, The Cement of Society, Cambridge University Press, Cambridge

[40] Coleman, 1990

[41] Mansbridge, 1998

[42] Coleman, 1990

[43] Durkheim, 1993

[44] Ben-Ner and Putterman, eds, 1998

[45] Etzioni, 1988

[46] Atiyah 1979

[47] Krygier, M, 1996, The Sources of Civil Society, Quadrant, October, p17

# CHAPTER 4: A CRITIQUE OF THE FOUNDATIONS OF ECONOMIC RATIONALISM

> *"I perceive," said the Countess, "Philosophy is now become Mechanical." "So Mechanical," said I "that I fear we shall quickly be asham'd of it; they will have the World to be in great, what a watch is in little; which is very regular, & depends only upon the just disposing of the several parts of the movement. But pray tell me, Madam, had you not formerly a more sublime Idea of the Universe?"* Fontenelle[1]

> *If we see knowing not as having an essence, to be described by scientists or philosophers, but rather as a right, by current standards, to believe, then we are well on the way to seeing* conversation *as the ultimate context within which knowledge is to be understood.* Michael Oakeshott[2]

## INTRODUCTION

At the conclusion of chapter 3, it was argued that the proposition that self-interest as the fundamental ordering principle operating in society cannot be sustained. This is in contrast to many economists who generally argue that the existence of social groups can be explained as the result of voluntary contact between individuals who have made the rational calculation that cooperation is in their long-term self-interest. This view begs the question of whether individuals are actually capable of determining what is in their long-term self-interest. In contrast, we argue that civilisation required the suppression of self-interest through social norms and that, in practice, our decisions are deeply affected by our values and our emotions. Consequently, the complexity of relationships and institutions in modern societies, which make the division of labour possible, cannot be reduced to voluntary transactions.

We also argued in chapter 3 that our moral codes and our legal system provide infrastructure essential for the social system in general and the economic system in

particular. While it has long been recognised that infrastructure is essential to the functioning of the economic system, economists generally have taken that infrastructure for granted, limiting their consideration of infrastructure to physical infrastructure. But this limitation involves a very narrow understanding of the concept of capital, a limited understanding that is beginning to break down. Thus, we now have a recognition, among some economists, of the importance of 'human capital' to the functioning of the economic system, though that concept is frequently confined to embodied marketable knowledge and skills. But this is far too narrow a view of the skills required for successful human interaction, both economic and social. The development of that human capital involves the process of socialisation and moral education. But the content of that socialisation has been invented in the process of social evolution and involves some vision, or visions, of the 'good society'.

It is clear that religious and intellectual speculation have played an important part in the development of such visions. Such speculation involves the attempt to see beyond the historical to what, in the rationalist, scientific tradition, are conceived of as more radically fundamental, underlying forces. Such a vision, and its associated speculative reasoning structure, attempts to lay down the form that moral justification *should* take.

As indicated in Chapter 2, these are not new questions. Rather, they are as old as philosophy and its fascination with deductive political and moral theories. Indeed, even the idea of the invisible hand, beloved of economists, was old in 1759 when Adam Smith used the phrase.[3] Just how old may come as something of a surprise. In his *Theory of Moral Sentiments*, Smith says:

> "that the ancient Stoics were of opinion, that as the world was governed by the all-ruling providence of a wise, powerful, and good God, every single event ought to be regarded, as making a necessary part of the plan of the universe, and as tending to promote the general order and happiness of the whole: that the vices and follies of mankind, therefore, made as necessary a part of this plan as their wisdom or their virtue; and by that eternal art which educes good from ill, were made to tend equally to the prosperity and perfection of the great system of nature."[4]

Indeed, the idea originates with Hesiod in the seventh century BC, one of the earliest Greek epic poets and the first known individual to Western civilisation to have incorporated precepts into poetry.[5]

In Chapter 2, we provided an evolutionary account of the emergence of social order along with a brief summary of the various ahistorical theories which have been used to account for social order. These ahistorical approaches have not led to, nor are they likely to lead to, any consensus. Indeed, it has been argued that the history of the social sciences has been dominated by three competing opinions:

- society is merely a collection of individuals (nominalism);
- society is an integrated whole, that the term *society* stands for a reality (philosophical realism); and
- society is neither a fiction nor a fact, but an entity ever in the making, a process.[6]

The first view is based on a mechanical, atomistic metaphor and leads to mechanistic analogies and social theories in which supra-individual forces must be explained in terms of individual behaviour. It sees the social system as an equilibrium system. It is this view that drives neo-classical economics. But this perspective, in denying the existence of a super-individual entity, still has to account for our understandings of such entities. Simply to suggest that such understandings are mistaken would be inconsistent with that perspective's own methodological individualism by denying the primacy of the meanings and intentions of individuals.[7] The second view, which is based on an organic metaphor, is the way that ancient Greek and medieval philosophers viewed society. Society is conceived of as an organism similar to the human body, a view lending itself to biological analogies. Important historically in this regard is the view of God as the head and society as the body.

Both of these views yield useful insights into certain aspects of society. Yet both exclude essential elements of the social order and, therefore, do not provide an adequate account. The third view of nature as process, or as evolution, arises primarily out of the relatively recent experience of change in social and economic life within the lifetime of reflective commentators. Change consequently came to be seen as a fundamental factor that had to be explained. This process view better accounts for both the integration of the social order and the independence of the individuals that comprise it.[8]

What is clear is that we are heirs to a dominant tradition of moral and social argument based on a mechanical metaphor that continues to influence our policy development processes. Consequently, it is appropriate to turn to a more detailed account of the origins of the various social doctrines, including social contract theory, that influence contemporary economic thought, and contemporary public policy development. Such an account is necessary to any proper understanding of the origins of economic rationalism and its critique.

## THE HISTORICAL EMERGENCE OF THE INTELLECTUAL BASIS OF MODERNITY AND MARKET IDEOLOGY

The *polis* of classical Greece was one such intellectual model.[9] It was only in the *polis* that real human existence was deemed to reside. In medieval times, St Thomas Aquinas provided a Christianised Aristotelian model, a hierarchical edifice in which humans served Godly ends. A later, ethical vision of the social world was provided by Calvin and his followers. These theories involved an account of social existence in terms of a vision of ultimate good. In the Christian versions, the explanation was in terms of a Divine purpose. Common to all these visions is a transcendental, if not transcendent, source of moral action as the basis of social existence.

What is important, for this account, is the fact that the medieval concept of man as a political and social being, necessarily involved in a network of social relations, which had been derived from Aristotle, gradually waned. This decline brought with it a need for a new explanation. This change was associated with the decline of the moral and secular authority of the Western Christian Church, partly as a result of the struggle for power between religious and secular authorities in medieval Europe, and partly as a result of the Reformation and the religious and political strife that followed. Tawney describes this change as follows:

> "The difference between the England of Shakespeare, still visited by the ghosts of the Middle Ages, and the England which emerged in 1700 from the fierce polemics of the last two generations, was a difference of social and political theory even more than of constitutional and political arrangements. Not only the facts, but the minds which appraised them, were profoundly modified . . . The

> natural consequences of the abdication of authorities which had stood, however imperfectly, for a common purpose in social organization, was the gradual disappearance from social thought of the idea of purpose itself. Its place in the eighteenth century was taken by the idea of mechanism. The conception of men as united to each other, and of all mankind to God, by mutual obligations, arising from their relations to a common end, ceased to be impressed upon men's minds."[10]

Progressively, and certainly by the eighteenth century, the intellectual climate had come to be defined by Deism and an associated distancing of God from human affairs.[11] Under this Deist view, while God had actively created the Universe and consequently was the final cause of the physical and social order, God had then turned His back, leaving it to operate automatically by laws built in at the outset. This involved a different vision of God from that the Judeo-Christian revelation, that of the Stoics, a God fitting the Newtonian mechanical world view, the starter of the cosmic clock, a God filling the gaps between the rapidly expanding natural forms of explanation and social and physical reality. Thus, the Enlightenment rejected Christianity's claim of a historical revelation which had absolute significance, a sacred mystery that was the source of truth and value.[12] In this rejection, the magisterium of the church – its claimed authority to teach on faith and morals on the basis of a commission from God - passed imperceptibly from ecclesiastical authorities and their theologian advisers, to political and moral philosophers who claimed an authority to teach on social and political arrangements because of their special knowledge of the Truth and of Natural Laws. What remained in Deism as a remanent of God's presence in the world, an echo of the Almighty, was the facility of reason, the holiness of rationally.

This Deist view is still a vision of a benevolent God, Natural Laws having been created to ensure human happiness. Consequently, the discovery of, and obedience to such Laws was essential to human happiness. The development of natural moral theory is implicit in such an approach. It is also teleological in that it imputes a purpose to social phenomena. This trend is directly associated with the development of science and a desire to find a scientific and increasingly more natural explanation of the social order. This established the intellectual milieu that determined what was accepted as a valid explanation. In this climate, the transcendent grounding of the social order was no

longer seen as providing an adequate explanation. While not yet totally abandoning belief in and a reliance on the benevolence of God, human attributes or 'human nature' increasingly were seen as the ultimate determinant of the regularities and uniformities in social life and to support a vision of the social good. This appeal to nature and reason was an appeal to nature and reason as a source of authority justifying social, political and economic arrangements. It was a process that progressively divinised Nature and human Reason, providing a secular source of meaning and justification as comprehensive and as dogmatic as that provided by the religion it replaced. Clark calls this project, sprung from the Enlightenment, the Natural Law Outlook. It was a project with three essential elements, a belief in social physics, naturalism and the derivation of a natural moral theory.[13] Universality and sacrosancity are implicit in this outlook.

For example, Thomas Hobbes, one of the early thinkers of Modernity and the first of the major contract theorists, had a strong interest in the new philosophy and science of the seventeenth century.[14] Indeed, Hobbes had with a materialistic and mechanistic theory using the Newtonian metaphor even before Newton. He aimed to develop a science of politics comprised of universal propositions proven as conclusively as the propositions of Euclid. This new type of political theorising, which became typical of modernity, incorporated a new and distinctive view of the way in which people should relate to the world. The individual is conceived of as an isolated mind and will with a vocation to bring the world under the control of reason, a way of thinking that privileges the rational, wilful subject.[15] Of course, Newton, the seminal figure in the science of the seventeenth century, gave this natural law outlook widespread scientific credibility. Newton emphasised the independence of scientific discoveries from theology and metaphysics, even though the belief in a Divine order was central to his beliefs.[16] Thus, he believed that the rational and the natural were synonymous. Consequently, the structure of nature, God's design, could be discovered by reasoning, particularly mathematical reasoning, applied to observation and experimentation. But he also believed that this method was important for moral philosophy and for salvation for that also was part of God's design.

Hobbes' theory involved a mechanics of the mind and a mechanics of society in which strivings within our bodies determined our actions in our relationships with each other. For Hobbes, the sociological counterpart to the concept of gravity was the unceasing

pursuit of power and pleasure. This is a theme that reappears latter in Bentham in his utilitarian account of morality. It was Hobbes, and then Locke, who sowed the intellectual seeds of economic liberalism. Importantly this tradition breaks with Aristotle and Acquinas and their view of humans as inherently social and political animals. Rather, they postulate theories that are highly individualistic and pre-social, and that are voluntaristic, consensual and rationalist.[17] Nevertheless, they are theories with roots in earlier political theorising where the idea of contract was used to undermine the quasi-divine pretensions of kings and emperors.[18]

This use of the idea of contract can be traced to the Old Testament, to Roman law, and the political practice of medieval Europe, where kings were often elected and ruled in accordance with pre-existing laws and customs.[19] In particular, among the Germanic peoples the idea of a *pactum* governing their monarchy was derived from the idea of a covenant which in turn was derived from the social and religious history of the ancient Mid-East as recorded in the Old Testament. In such a covenant, Divine authority was invoked as a witness to morally binding agreements. These agreements were often in the form of a suzerain treaty between a stronger political leader and a weaker one but also covered mutual pledges between more equal partners. The Old Testament relates how this "basic, 'mutual,' oath-bound creation of responsible relationships" was recognised to be a close analogy of the way in which God relates to humanity and a model of how we should relate to each other under God.[20] And it involves a revelation of the nature of a just, merciful God who directly engages in the formation and sustaining of righteous living in community.

The development of social contract theories was also closely associated with the religious, social and political developments in the surrounding societies. Thus, contract ideas provided radical Protestants with a means of justifying their political dissent. For example, contractarian ideas were congenial to Calvinists engaged in struggle against ruling secular authorities opposed to their religious beliefs. The *Vindiciae Contra Tyrannos*, which appeared in 1579, attributes the obligations of a ruler to his vocation or Divine calling. Consequently, the covenant between ruler and people was not simply between ruler and people, it was between ruler, subjects and God and expressed the will of God.[21] It was the influence of Calvinism, with its propensity to think of obligations in terms of covenants, combined with the importance of Calvinism in the political

conflicts in sixteenth and seventeenth century Europe, which first raised contract theory to a central position in political theory.[22]

In particular, the popularity of the contractualist ideas in seventeenth century Britain is directly attributable to the influence of Puritanism, the English brand of Calvanist Protestantism. Contractarian ideas were used by politicians and propagandists to justify rebellion during the Civil War provoked, in part, by the religious policies of Charles I. For example, this Puritan contractualism is reflected in *The Agreement of the People*, a proposed contract drawn up in 1648 and 1649 by the Levellers, the radical democratic party in the English Civil War.[23] Similarly, covenant and social contract ideas, particularly the social contract ideas developed by Locke, were used to justify the second expulsion of the Stuarts in 1688, and, indeed, became part of the prevailing ideology.

In the period of the civil war, the Whigs wrested from the Crown a new freedom of property, having feared for their property in the face of the Stuart Kings' efforts to raise revenue.[24] Changing ideas about the nature of property rights came to a head at the same time as changing ideas about the relative rights of Crown, Lords, and Commons. While in medieval times the relation between the Crown and its tenants combined both rent and taxes, the ideas of rent and taxes had gradually became separated. Consequently, the abolition of feudal tenures in 1660, and the creation of new excise taxes, marked a fundamental shift in ideas about land as private property. The great lords ceased to be tenants of the crown but owners, while freeholders also began to see themselves as owners. In medieval times, people owed a wide range of duties to their feudal lord, to other people, to the Church, and to God. Consequently the possession of property involved temporary custodianship, not ownership, and carried duties as well as rights. At the same time, it was the duty of those in authority to stamp out usury and to ensure that prices and wages were just. Now, however, ideas about the ownership of property were tending to become more 'absolute'. Indeed, for the propertied classes over this period, England was largely a property owners' association.[25] The landless classes were excluded from the political process and it was against them that government protection was required. These changing ideas and the associated theories of Hobbes and Locke were also related to the emerging market society.[26] The

consequence was that the logic of capitalism, the logic of rationalisation and the Enlightenment's faith in material and moral progress became intertwined.[27]

Consequently, the propertied elite found it easy to conceive of civil society as based on a social contract, not on socially defined moral obligations backed by Divine Law.[28] Gradually, the concept of contract replaced custom as the source of law and social obligations, including the obligations associated with commercial contracts. There was an ambiguity in this theorising.[29] It is not entirely clear whether Hobbes and Locke were discussing the origins of political society or criteria for judging it. It does seem that both believed that theirs was an historical account. It is now clear that they were not accurate historical accounts. Subsequent contract theorising, like that of Kant and Rawles, is defended as an analogy in which contract is used to try to deduce the ideal form of political organisation.[30] As such, they are clearly normative theories. It also seems clear from the political use made of it that Lockes' social contract theory was also seen as normative. We might note in passing that the standard criticism of such theories is that they presuppose a universal human nature that determines the distinguishing characteristics of the 'state of nature' that lead to a need for a universal contract. However, the wide differences in values and practices that have been observed in practice undermine belief in such a universal human nature. Social contract theorists have not relied upon an account of human nature based on empirical evidence, but on an arbitrary, idealised model that assumes that human beings are motivated by self-interest and that they are rational in their pursuit of that self-interest. As we have already seen, these are the assumptions under which neo-classical economics operates.

What was new was the idea that contractual relationships were created by the free choice of the individuals involved, not the idea that such relationships involved mutual rights and duties. Thus for Hobbes, a price agreed by the parties was a just price merely by virtue of the agreement. Importantly for our account, for Hobbes the obligation to abide by one's promises, a cornerstone of all social contract theory, is an obligation of natural law which corresponds to the self-interest and common interest of all men.[31] For Hobbes, civil society was created by men acting freely, even when it was imposed upon them by conquest. The overriding requirement for law meant that rational men would and did assent to surrender their 'natural liberty' even to a conqueror. This aspect of Hobbes' doctrine appears to reflect Hobbes' commitment to peace, a

commitment reflected in his submission to Cromwell in 1651 after the defeat of the Royalists. But this aspect of Hobbes' doctrine was unattractive to his English contemporaries as it implied that everything done was done voluntarily. It also questioned the legitimacy of the execution of Charles I.

Locke's ideas were much more acceptable as he modified Hobbes' account to provide a justification for resistance to tyrants in the name of individual rights, liberty and property. Indeed, Locke was closely associated with the Whig cause and their struggle against James II that culminated in the latter's fall in 1688. Indeed, Locke, the great defender of property rights, was the philosophical spokesman of the great Whig landowners, the landowning classes, and the rising bourgeoisie.[32] And Locke owed his influence to that defence. But Locke was the first contract theorist to give an adequate account of the state as a territorial unit as an amalgamation of land already owned by the contractors.

In Locke's state of nature, people are naturally free and equal and are not in a constant state of war. Rather, they are acquiring property. They own their own person and they own their labour. It was through this labour that the common property of mankind was appropriated to individual use. It was the hard working who acquired the most property. While in the state of nature there were severe limits to the unequal division of property, the invention of money made possible for great inequalities of wealth to develop. In using money, people had tacitly agreed to such an unequal distribution. And in establishing civil society, individuals agreed to surrender some of their right to protect that property. Consequently, for Locke, the principal role of government is to protect property rights, rights that predate government itself. Since it is transparently obvious that no one had, in fact, assented to such a contract, Locke relies on the notion of tacit consent to support his contractual views.

This theory drew heavily on the concept of Natural Law, a Natural Law deriving from Divine Law, to explain, in particular, the limits on the powers of government. The obligation to keep promises and agreements derives directly from that Natural Law. Indeed, Locke drew on the Anglican theologian, Richard Hooker, the creator of the distinctive Anglican theology, the *via media*. For Hooker, society was natural: it did not occur spontaneously but resulted from the deliberate seeking of communion and

fellowship in political societies. Government and laws were also the result of agreement.[33] For Hooker, the universe was ruled by Natural Laws appointed by God, governing both the physical universe and moral questions. They were discovered by reason and were not solely to be found in scriptures or in church teaching. This vaguely religious justification of property also helped to make Locke's ideas more attractive to the English governing classes.[34] Nevertheless, over time this concept of Natural Law came to be stripped of its associations with Divine Laws, and Nature ultimately came to denote human appetites.

Both Locke and Newton were strong influences on the Scottish Enlightenment, of which Adam Smith was a leading figure. Important to this account is also the influence of the dominant Protestant Natural Law Philosophers, Hugo Grotius and Samuel Pufendorf. It is through these influences that the Natural Law Outlook was transmitted to Smith. Their philosophy was a continuation and an extension of certain strains in Scholasticism, in particular, their distinction between positive law and natural law. Natural law was seen as the earthly manifestation of Divine Law, revealed through nature and reason, while positive law was created by humans.[35] Both were also leading contract theorists in their own right, as well as leading legal theorists. For Grotius, natural laws worked through a social instinct implanted in humans by God. Importantly, he attempts to make the natural law independent of revelation. Smith, himself, acknowledges the influence of Grotius on *The Theory of Moral Sentiments*, while he appears to have also followed his lead in his Lectures on Jurisprudence.[36] For Pufendorf, the study of moral philosophy was the study of natural law, a natural law that was generally the same as the Biblical injunctions to love God and one's neighbour as oneself. It was through Pufendorf and Locke, that the natural law tradition provided the foundation for the moral philosophy of the Scottish Enlightenment. Importantly, Cumberland's major work, *A Treatise on the Laws of Nature*, was a systematic attack on Hobbes's claim that humans were not naturally suited to society.[37] He held, on the contrary, that self-interested actions promote public welfare. It was this critique that Locke picked up.

The Scottish Enlightenment's idea of civil society was an attempt to develop a synthesis between a number of developing oppositions seen in social life. New forms of social action based on self-interest, and the concept of the self, made it necessary to imagine a

moral order that could accommodate interpersonal relations based on the principle of rational self- interest.[38] These dichotomies between the individual and the social, the private and the public, egoism and altruism, as well as between a life governed by reason and one governed by the passions, have become constitutive of our being in the modern world.[39] What was new in this vision of civil society was its understanding of human interaction as a moral sphere where moral attributes were derived from the nature of humans themselves, and not a transcendent reality. The concept of moral affections and natural sympathy were now provided the grounding that had previously been provided by God.

In his *Treatise on Human Nature* and again in an essay, *Of the Original Contract*, David Hume attacked Locke's social contract ideas.[40] Nevertheless, Hume agreed that, at first, government was founded on contract because men were so equal in physical ability that they could be subject to authority only by their own agreement. However, Hume rejected the contractarian account of legitimate political authority. There was no state of nature. It was a mere philosophical fiction. Nor was society formed by a social contract constituted by promises. Rather, societies evolved and formed gradually. Even if there had been some initial agreement, the subsequent obligations of its citizens did not, and cannot, be derived from any original agreement, to which they were not parties, nor from any renewed agreement of their own. Similarly, he rejects the notion of tacit consent. In practice, allegiance does not depend on choice as emigration is not usually a real alternative.

For Hume, the duty of allegiance owed to a state and the obligation to perform contracts are both based on self-interest and neither is derived from the other. Similarly, Hume rejects the idea that society is founded to protect property rights. The concept of a property right is itself an artificial concept depending upon morality and justice and these are notions created and recognised by society. Property rights cannot pre-date society. Indeed, for Hume, the whole contractual edifice of political theory is unnecessary. Both justice in general, and rights of property in particular, as well as the obligation to perform a promise, derive from convention, in the same way that the use of money or language derive from convention.

While his direct influence was small, his indirect influence, through Adam Smith and Bentham, was significant. But what was to stop this individualistic, self-interested society from degenerating into the Hobbesian war of all on all? There were two answers offered to this question by eighteenth century thinkers.[41] The first was that it was enlightened self-interest, not unbridled licence, which was involved. For example Hume assumed that most of the educated would realise that it was in their interests not to pursue short-term advantage at the expense of longer-term interest. Those who did not would be dealt with by the law and would adjust their behaviour. Thus, for Hume, obligations which originally come from self-interest are generalised until they are seen as general moral obligation, independent of particular cases. The second answer claimed that there was a natural harmony between individual interests and the public interest. Provided that a proper framework of law and order and property rights was maintained, the pursuit of individual self-interest would further the national good.

Adam Smith is associated with this second answer. For example, in his *Lectures on Jurisprudence*, he argued that increased commercial dealings lead to greater respect for commercial arrangements, because the more dealings a person has, the more does self-interest demand that she honour these arrangements.[42] Smith elaborated the doctrine of the harmony of interests in *The Wealth of Nations*. In the process, he also drew upon the Natural Law Outlook derived, as we saw above including from Locke. For Smith, moral sentiment balanced any attempt to describe rational self-interest in terms of Reason disengaged from the 'passions', or of the self freed from the eyes of others. Thus, Smith is no admirer of mere selfishness:

> "The wise and virtuous man is at all times willing that his own private interests should be sacrificed to the public interest of his own particular order or society. He is at all times willing too, that the interest of this order or society should be sacrificed to the greater interest of the state or sovereignty, of which it is only a subordinate part. He should, therefore, be equally willing that all those inferior interests should be sacrificed to the greater interest of the universe, to the interest of that great society of all sensible and intelligent beings, of which God himself is the immediate administrator and director."[43]

Indeed, for Smith, the desire for recognition by others was the motivating force of economic activity. Therefore, the individual self could never be totally disengaged from

society, nor could reasoned self-interest be abstracted from those passions which, through the moral sentiment, rooted man in society.[44] Thus, there was a recognition of the interdependence of individuals, and the social embedding of individual existence. Similarly, this civil society tradition was inconsistent with any restriction of reason to what we would now call instrumental rationality.

Despite his popular identification with laissez-faire ideas, Smith took no crude minimal view of the functions of government. In his view, the state had three principal purposes: to protect citizens from external enemies; to protect citizens from force and fraud; and to erect public works and institutions which were in the public interest but too costly to be carried out by individuals. Importantly for this account, Smith rejects any dogmatic prohibition on State interference with contracts:

> "Such regulations may, no doubt, be considered as in some respect a violation of natural liberty. But those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be restrained by the laws of all governments . . . The obligation of building party walls, in order to prevent the communication of fire, is a violation of natural liberty, exactly of the same kind with the regulations of the banking trade here proposed."[45]

Consequently, it is clear that Smith was not advocating a society simply based on selfishness and greed. On the contrary, in *The Theory of Moral Sentiments*, Smith discusses the basis of moral feelings or sentiments and their relationship with justice. Smith argues that though men have natural sympathy for each other, and are led by that sympathy to act with benevolence, these motives are insufficient to curb men's natural propensity to act in their own interests. Thus, for Smith, Justice is the supreme virtue as it counteracts human selfishness. Importantly, for Smith also, the 'invisible hand' was a consequence of Divine design, of a benevolent providence that had so arranged human nature so as to produce this outcome.

However, in the early nineteenth century, the desire to create a science of morals and legislation, the central ambition of positivist social thinking since the seventeenth century, became centred on utilitarianism, a development of elements of Hume's thought.[46] By attributing to humans certain fundamental inclinations, utilitarians

claimed to have given morals and politics an empirical foundation. These tendencies provided a substitute for the fictional natural rights on which Locke and earlier theorists had relied. In the process, utilitarians provide an ahistorical *scientific* account of moral theory based on a mechanical Newtonian model in a somewhat similar way to Locke, that is, one based on a natural law outlook. Thus, Bentham starts from his particular view of man and deduces all institutions and legal arrangements from his properties. While Bentham made random use of historical examples, it is doubtful that utilitarian theorists provide an account of the process by which society was formed.[47] This utilitarianism was pragmatically attached to classical political economy.

Bentham provided an alternative legal philosophy to social contractarianism, though he did not extricated himself from the natural law outlook that had been associated with contractarianism and the Enlightenment more generally. In particular, he used the idea of a state of nature similar to Locke's and retained his individualism. However, there was a change of emphasis because, for Bentham, the law maker was to create and adjust laws to create an artificial harmony of interests between individual action and the public good. Similarly, in *Utilitarianism*, Mill also argues that there is no natural harmony of interests and that it is the law-maker's role to create such harmony.[48] For Mill, the principles of Justice are principles of long-run expediency. This alternative view was mirrored in the growth of legal positivism whereby law was not the result of a social contract but of a hierarchical power relationship. The source of authority was customary obedience. It also reflected a growing scepticism with universal principles of human nature, a scepticism which many contemporary economists seem to have overlooked. Of course, there was great dissatisfaction with the initial utilitarian account. Indeed, support for utilitarianism was undermined by a refusal to believe that pleasure and pain were the only sources of human action, a belief that seems to contradict everyday experience. Nor can it explain why people find pleasure in different things.[49]

The social evolutionists sought to provide an alternative account that was both scientific and historical. In the process they abandoned the psychological reductionism that had characterised Hobbes and Locke and many subsequent theorists. For Spencer, the leading social evolutionist,[50] the principle of utility was no rule but the articulation of the problem to be solved.[51] Indeed, the theory of evolution undermined the notion of a

universal human nature on which deductive utilitarianism depended. Spencer drew on the increasingly secularised Natural Law tradition; a secularisation which reflected the increasing rejection of earlier religious certainties. Thus, for Spencer, the universality of natural causation provided a substitute for the puritanism of his childhood, with progress a substitute for the eschatological promises of Christianity. Indeed, in much nineteenth century thought, the uniformity of nature had acquired a logical status and a numinous aura that made it a substitute for the idea of God. In the process, moral qualities were bestowed on the universe.

Spencer saw the idea of evolution from the simple to the complex as a process deriving from the fundamental laws of matter and motion, to manifestations of force. Indeed, for him, only classical mechanics, or what has previously been described as the Newtonian metaphor, provided an adequate scientific understanding of reality. In this he was typical of his age, the age immediately before the rise of relativity and quantum mechanics in physics. He attempted to apply evolution to all phenomena in the universe, particularly to the social world. Indeed, he was an evolutionary determinist with progress occurring through inevitable stages according to inflexible laws:

> "Either society has laws, or it has not. If it has not, there can be no order, no certainty, no system in its phenomena. If it has, then, are they like the other laws of the universe – sure, inflexible, ever active, and having no exceptions?"[52]

He saw social life as a struggle similar to the struggle for survival in the natural world. Consequently, he saw social competition as part of the process of evolution. Importantly, nothing could be done in the long-term to stop the process of competition and the attempt to do so, to alleviate social conditions, merely assured the short-term survival of the unfit. This doctrine had much in common with Malthus's belief that the poor were redundant.[53] Thus competition, and the survival of the fittest, was justified as if it were a natural scientific law. This elevation of competition served to justify Spencer's strong opposition to social legislation, a function it continues to serve. In this view a lack of success is associated with lack of virtue. There was some ambiguity, however, as to whether the fittest meant the best, or merely an adaptation to existing circumstance. Of course, this ambiguity goes to the heart of the difficulty with this type of theorising. If it is the best, then why? The answer to that question adds another layer

of moral theorising. If it is merely adaptation to existing circumstances then why is that adaptation moral?

Freedom of contract was a necessary part of Spencer's theory. It was the supreme mechanism for maintaining social order with the absolute minimum of compulsion and coercion. Thus Spencer's views can be seen as an extreme version of contractarianism in which the state is nothing more than a large partnership.[54] Restriction on the freedom of contract interfered with the natural order of things and enabled the unfit to survive longer than they would otherwise so. Importantly, Spencer regarded the claims of social institutions other than economic institutions as alien to the human personality, from which it will ultimately free itself. Consequently, Spencer opposed a wide range of social reforms on the ground that it constituted an interference with the freedom of contract. Surprisingly, Spencer saw his views as being consistent with the utilitarian formulae of the greatest happiness of the greatest number. This pseudo-science was not particularly influential in England. It was, however, very popular in the Unites States for a long time and had a formidable influence on American thinking and law.[55] Thus Murphy writes:

> "Spencer's influence on American thought in the second half of the nineteenth century was particularly strong. He formulated his laissez-faire philosophy in such a way that it appealed 'at once to the traditional individualism and the acquisitive instincts of Americans, who were able without too great inconsistency to regard whatever they did, individually, as in harmony with evolution and whatever government or society did, collectively, as contrary to natural law.'"[56]

Vestiges of this doctrine remain in some extreme justifications of the market system and of its social inequality that are met in economic rationalism.

To sum up, we saw with Hobbes and Locke the beginnings of a new type of political and moral theorising. This theorising sought its ground in the natural world, individualism and the so-called scientific perspective. While the various theories that have been recounted do not, of necessity, make a coherent whole, they nevertheless reflect the same Enlightenment ambition to produce a secular, naturalist, and rational justification for our moral allegiances and social arrangements. As such, it represents a tradition of thought sharing certain presupposition and ways of conceptualising, and in

which the participants frame their thoughts in relationship to earlier thinkers in the same tradition.[57] This Enlightenment ambition has failed for reasons that will be explored shortly.[58]

This tradition, nevertheless, constitutes the complex of ideas, the background mood, on which market ideology and economic rationalism rely. Thus with Locke we have a view of property rights as being prior to society, a natural right, but a natural right based on divine law. We also see the contract metaphor used to explain the existence of society. With such theorists as Mandeville, Hume, and Smith, we see the gradual transformation of self-interest from being a source of moral failure to a source of public good, albeit moderated by competition and by a dash of sympathy for others. In the process, the Divine underpinnings were gradually removed to be replaced by Nature and Reason, concepts that were, themselves, increasingly deified. And through the alchemy of the Newtonian metaphor, these naturalist justifications of self-interest are turned into a formal moral theory in the form of utilitarianism. And of course it is this utilitarianism which underlies much economic theory. With Spencer, the moderation, which was in Smith, was removed and instead the attempt is made to justify naked self-interest under the rubric of the survival of the fittest. They all share what Rorty calls Locke's unfortunate desire to privilege the language of natural science over other vocabularies.[59]

More recently, we have seen a major revival in contract thought as a consequence of Rawls' *A Theory of Justice*.[60] Interestingly, Rawls' idea of a reflective equilibrium as a way of evaluating our sense of justice, and as a theory of moral sentiments, is a deliberate echo of Adam Smith.[61] It has already been argued that the concept of social relationships as contractual is taken for granted by economic rationalists and by economists generally. Indeed, Gauthier claims that such a view lies at the core of the ideology of Western capitalism.[62] This ideology, this metaphor, this claim to conceptual priority, is now part of the deep, pre-reflective structure of self-consciousness, the way in which we conceive of ourselves as human, relate to each other, to structures and institutions and to the natural world. Society is conceived of as merely instrumental, meeting no fundamental human need.[63] It also involves a view of ourselves as insatiable appropriators engaged in a competitive search for power, with rationality, itself, understood as related instrumentally to the satisfaction of individual

interests. Gauthier sums up the historical development of this ideology in the following terms:

> "What is to be appropriated is first thought of as real property, land or real estate. The distinction between land and other forms of property is then denied, and what is to be appropriated becomes the universal measure of property, money. Finally, in a triumph of abstraction, money as a particular object is replaced by the purely formal notion of utility, an object conveniently divested of all content. The rational man is . . . simply the man who seeks *more*.
>
> "Thus it follows that not only the individualistic instrumental conception of rationality, but more precisely the individualistic utility-maximizing conception, is part of the ideology of the social contract."[64]

Of course, the *more* that is sought is the secular rationalist equivalent of grace.

The maximising conception of rationality entailed by contractarianism and the natural law outlook precludes the very possibility of rational agreement, because it undercuts the internal constraints necessary to maintain contractual relationships. In the past, radical self-interest has usually been considered a primary threat to society, to be repressed by religion, law, morality and tradition. As has been argued in Chapter 3, the contractarian tradition, contemporary economics, and more especially, economic rationalism have failed to understand the extent to which the social, political and economic order has been sustained by motives different from those contained in the contractarian conception of human nature. The faith that is placed in this contract tradition, and this form of theorising, cannot be sustained.

## THE MODERNITY DEBATE

The critique of this form of theorising draws on what is called the modernity debate.[65] This is a debate that questions the claims of the Enlightenment tradition, of which the above social contract theories form a central part. Thus, it challenges the natural law outlook, or what Lyotard calls the mood of modernity, and its associated grand narratives.[66] It is also a rejection of the claimed privileged status of science and

rationality, the belief in universals, and in a common human nature, absolute truths, universal values, the dominance of technology, and the perfectibility of human nature.[67]

Indeed, the Australian theologian, Duncan Reid[68] sees a paradigm shift, a decisive break, occurring in our worldview. This paradigm shift has two interrelated aspects. The first involves a shift away from Western, political, cultural and economic predominance. This shift is accompanied by a change within the Western scientific worldview and a sense of disillusionment with the technology it has given us. The Newtonian mechanistic worldview has been undermined. Physics has come to understand reality, not in terms of discrete particles, but as a complete network, the most basic elements of which were not entities or substances, but relationships:

> "All entities, even inanimate entities, constituted as they were by their 'experiences' of being in relationship, could now be understood as subjects which adapt to their environment. Reality was no longer to be 'grasped' solely by analysis and reduction to component parts. Understanding had to be reinterpreted in a less dominating, more participatory way, as the perception of parts interacting in the context of an indivisible totality."[69]

This has been accompanied by a crisis of meaning in Western epistemology:

> "The whole Western philosophical tradition had worked on the assumption that knowledge (hence truth, as meaning or essence of being) was accessible through language. But now the word . . . has been unseated from its place of honour. Language, rather than an inadequate but in principle perfectible attempt to refer to some intelligible metaphysical reality beyond itself, has come to be seen as a self contained system in which reference is to the system itself."[70]

The common thread in these two crises is the loss of any sense of objective certainty in the physical sciences or the political-cultural sphere. As a consequence, we have to deal with a new and profound sense of historical relativism and the belief that there can be no over-arching 'absolute' or unifying principle which can reconcile all the relativities of human thought and experience.

The present author approaches this debate from the perspective of a Christian in the reformed tradition.[71] Thus, from the very beginning, the author rejects a central tenant

of the Enlightenment's project, its attack on revealed religion and its rejection of a God actively involved in human history, and the associated search for an alternative source of certainty. God exists and, therefore, absolute truth must exist, providing an absolute basis for hope and morality. But God's transcendence places that truth beyond human reach.[72] Consistent with the Christian doctrine of original sin, our search for truth is personal, limited, and tainted by self-interest and sin. This view leads directly to a rejection of the absolutist claims of economic rationalism, and of rationalism more generally. Indeed, for the author, the absolutist claims of economic rationalism, and its mean-spirited rejection of the role of government coordination, particularly in the alleviation of economic distress, cannot be reconciled with the Christian revelation. This view also leads directly to a rejection of the claims of the doctrine of freedom of contract, which is to be discussed in Chapter 5. This view will be taken up again in Chapter 8.

The following account will, however, follow a secular path drawing on prominent participants in the critique of the Enlightenment, particularly Rorty, Toulmin and Macintyre. The two approaches do, however, lead to similar outcomes, though the author's beliefs rescue him more directly from anxiety about the alleged horrors of moral relativism. The account is organised around a number of closely interrelated issues. These are the distinction usually made between positive and normative theorising, particularly in economics, the privileged status of science, the excessive faith placed in rationalism and thus the questionable status of economics as a science and the relevance of moral philosophy to public policy formulation. In the following sections a critique will be developed addressing each of these issues.

## THE DISTINCTION BETEEN POSITIVE AND NORMATIVE THEORISING, PARTICULARLY IN ECONOMICS

The struggle of Enlightenment philosophers to give a naturalistic, individualistic, 'scientific', and universal account of our moral codes was recounted above. Intertwined was the attempt to insulate that account from any Divine authority, while at the same time, trying to base those codes on empirical observation of human nature. The natural law tradition, so central to Locke's justification of his social contract theory, became increasingly secularised over several centuries, until with Spencer we finally arrive at

the unambiguous claim that moral judgements must be based on scientific principles. The effect of that particular attempt was merely to justify any existing moral and political arrangements. Since then much social thought has been preoccupied with finding a method that would either determine values objectively or avoid questions about values altogether.[73]

Notwithstanding the ambitions of Hobbes and Locke and their successors to found our moral judgement on science, social scientists recently have generally made a distinction between science and normative theorising. Thus, it is often claimed that value judgements lack the objective validity of science, and science must, as a methodological ideal, be kept free from them.[74] Similarly, economists have usually drawn a distinction between 'positive' and 'normative' economics. It has, of course, been readily admitted that the application of the 'positive' science of economics to actual public policy problems was a normative issue. This normally took the form of suggesting that it was in the choice of ends that the normative issue arose, while positive economics could safely address the best way of achieving those specified ends. The idea that ends and means are usually intertwined escaped notice.

In any event, the distinction between positive and normative can be traced to Hume who held that there was a watertight distinction to be made between the realm of facts and the realm of values:

> "I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulation of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible, but is, however, of the last consequence. For as this *ought* or *ought not*, expresses some new relation of affirmation, 'tis necessary that it should be observ'd and explain'd; and at the same time that a reason should be given for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers. . ."[75]

In economics, the distinction dates from Nassau Senior and John Stuart Mill,[76] and was confirmed by Weber[77] and Robbins.[78] More recently, Lipsey and Harbury in their introductory textbook make the same distinction.[79] Interestingly, Nassau Senior considered that any policy advocacy was outside the proper role of economics.[80] But the very idea that it was improper for an economist to make valuations is, itself, a valuation depending on some selected standard of judgement.[81] The erection of this conceptual dichotomy is a typical Enlightenment methodology, while the rejection of such dichotomous thinking is part of the postmodernist critique of the Enlightenment. In this connection, Macintyre points out that the distinction itself relies on the Enlightenment's dismantling of the Aristotelian teleological tradition of the Medieval world, so that it became possible to conceive of the individual as prior to and independent of social roles. But in the medieval world the argument that an 'ought' could not be deduced from an 'is' was clearly wrong,[82] and remains clearly wrong in any world where socially defined roles continue to exist.[83]

One possible basis of the distinction is the Cartesian mind-body dualism where facts belong to the 'objective' realm of the body, whereas 'values' belong to the subjective realm of the mind.[84] Alternatively, the distinction can be derived from a positivist view of science that considers all statements other than those that are either empirical or logical or mathematical as without content. Both positions are deeply problematic. Toulmin sees this positivist turn as a reaction to the progressively widening scope of science and a nostalgia for the Platonist demand for a single, universal, scientific 'method'.[85] This method was to be found in the claims of classical physics to impose its explanatory patterns on all branches of science. The idea that economics, while being a scientific discipline, is also a moral discourse, is inconsistent with this demand.

Under the influence of Max Weber and of the logical positivists, this distinction was transformed into a dualism between facts and values, between the descriptive and the prescriptive, between the empirical and the normative. Only judgments relating to the regularities of empirical phenomena could be true or false, while normative judgments could not be considered in this way. Weber argued that the norms of science are universal, while value judgements lack this universality.

However, explanatory theories do not occupy a privileged epistemological position compared to normative theories.[86] There is little in the social sciences that meet Weber's test of universality, while there are many value judgements which do meet the requirements specified by Weber, a shared method and adequate data. They are therefore, in Weber's terms, 'scientific'. However, it may be preferable to speak of the 'rational justifiability' of a proposition, rather than use the honorific title 'scientific'. It is the shared standards for truth and knowledge claims that are important. But, these standards are socially determined. What is seen as true or scientifically justified is the result of an organised and contingent consensus among an intellectual or scientific community. Consequently, a normative claim is just as susceptible to justification as any empirical or theoretical claim. The consequence of this line of argument is that the conceptual distinction between positive and normative serves no convincing intellectual purpose, while serving to privilege a particular type of discourse, a political tactic in the broad sweep of discourse.

Science is a learning process, a social process, which develops in some subcultures, and is characterised by the acceptance of an ethic, a strong value system.[87] Knowledge of the social system is an essential part of the social system itself. Consequently, objectivity, in the sense of investigating a world that is unchanged by the investigation of it, is not achievable. Science no longer merely investigates the world; it simultaneously creates the world that it is investigating. What it creates becomes a problem of ethical choice. Even the epistemological content of science has an ethical component. Under these circumstances the concept of a value free science is untenable. Myrdal endorsed this point of view:

> "Through out the book [The Political Element in the Development of Political Theory] there lurks the idea that when all metaphysical elements are radically cut away, a healthy body of positive economic theory will remain, which is altogether independent of valuations. . . This implicit belief in the existence of a body of scientific knowledge acquired independently of all valuations is, as I now see it, naive empiricism. Facts do not organise themselves into concepts and theories just by being looked at; indeed, except within the framework of concepts and theories, there are no scientific facts but only chaos. There is an inescapable *a priori* element in all scientific work. Questions must be asked before answers can be given. The questions are all expressions of our interest in

> the world; they are at bottom valuations. Valuations are thus necessarily involved already at the stage when we observe facts and carry on theoretical analysis, and not only at the stage when we draw political inferences from facts and valuations."[88]

Valuations are critical to the determination of facts, to all stages of inquiry. Consequently, value commitments are inevitable in the social sciences. In particular, every social science carries an implicit definition of what it is to be human to provide a focus for its research and to distinguish its field from those of the logician, physicist, or biologist.[89] But there are no grounds for deciding what is an acceptable definition. Thus the argument that neo-classical economics is a formal system, which merely explores the implications of the assumptions, the idealisations on which it is based, can not be convincing. No one develops such a system for pure pleasure, but to provide a guide to policy decisions, or as a justification of their ideological beliefs. The assumptions, themselves, incorporate normative valuations. Indeed, social science is a moral science by the very nature of the problems it deals with. Scarcity, conflict, inequality, domination, exploitation, and war necessarily create problems for a stable and legitimate social order. In any event, social science is part of the Enlightenment tradition that instrumentalised nature and now tends to instrumentalise human society itself.

From this perspective, the claim for the value neutrality of science, particularly social science, is simply another questionable aspect of Modernity. For Rorty, the positivist distinction between facts and values can only be sustained if there is a value-free vocabulary that renders sets of 'factual' statements commensurable.[90] But there is no such value-free vocabulary. Indeed, in choosing Galileo's vocabulary as a model, science and philosophy confused its apparent lack of metaphysical comfort, and moral significance, with the fact that it worked within a particular narrow compass. Consequently, they sought to eliminate subjective elements by avoiding terms that could not be linked definitionally to the terms denoting primary qualities in Galileo's and Newton's vocabularies. This is the seventeenth-century myth of nature's own vocabulary, the idea that only a certain vocabulary is suitable for describing human beings or human societies, the only vocabulary in which they can be understood. Thus, for Rorty, the issue between those who aspire after an objective, value-free, truly

scientific social science and those who think it should be acknowledged as something more hermeneutical is not a disagreement about 'method' but a disagreement about the sort of terminology to be used in moral and political reflection.[91] To say that something is better understood in one vocabulary than another is simply a claim that a description in the preferred vocabulary is more useful for a particular purpose.

Indeed, the growth of scientific and quasi-scientific knowledge has not been as socially beneficial as the Enlightenment imagined it would. The ethos of scientific rationality has consistently undermined and eroded the particular, the local, the implicit, and the traditional in the name of individual human emancipation.[92] As scientific knowledge and technical expertise have grown ever more specialised, scientific experts are often able to wield power and authority through their monopolisation of esoteric knowledge and the prestige which this knowledge brings. Similarly, the uncritical pursuit of social scientific knowledge works to reinforce the existing powers in society that fund that research.[93]

The common thread in this critique is the realisation that social science has an intrinsic connection with the moral and political life of society.[94] While the social scientist has an obligation to view reality as dispassionately as possible, our perceptions of reality and our assumptions about it are radically moral. There is no neutral platform of pure science utterly free from value commitments. Indeed, social science is a product of the development of a particular kind of society and its lexicon. The development of Enlightenment economics clearly took place in parallel with the development of the market system and serves to justify that system morally and scientifically.

There is a growing body of opinion that sees social science generally, and economics in particular, as moral inquiry. This position is consistent with the account of social order and the interrelationship between the economic and the social system given in Chapters 2 and 3. The distinction becomes far less convincing when placed along side the actual public policy questions on which economists provide advice. Inevitably, they involve leading normative questions. For example, the choice of methodological individualism as the basis of economic and political theorising is clearly a normative choice. The nature of property rights developed by a society also clearly involve normative choices. Pareto optimality, as a criteria for policy choice, is dependent on, and biased in favour

of, the existing distribution of power, wealth and property rights, and thus is not neutral. Likewise, the choice of the goal of maximising the value of output is a normative one. Similarly, the price structure is not neutral, being a function of the distribution of income, wealth and power.[95] In the case of the Fair Trading debate, the question of the regulation of unfair conduct was a normative one, and the arguments used were also normative. In that debate the advocacy of economic efficiency as the goal of public policy was plainly a moral choice.

The policy world is also one in which the end/means distinction used to defend the value neutrality of economics quickly breaks down. Thus while the distinction could have served to draw attention to the normative content of policy advice, in practice it has been used to camouflage the moral judgements of economists, and the normative presuppositions of the market system, behind the cloak of alleged scientific objectivity. Consequently, while the idea, and ideal, of value neutrality still persists, there is far less confidence in it than before. For example, Hausman and McPherson agree that the simple picture of the economist providing value-free technical information does not fit the economist who is asked for advice.[96] They argue that economists should care about moral questions for at least the following four reasons:

1. Behaviour, and hence economic outcomes, is influenced by the moral values of economic agents. Economists rarely describe moral commitments without evaluating them, and they affect that morality by how they describe it. Thus they should think about the morality that should be accepted, as well as the morality that is, in fact, accepted in society.
2. Standard welfare economics rests on strong and contestable moral presuppositions. The standard definition of a social optimum compares social alternatives exclusively in terms of their *outcomes* (rather than the rightness of their *procedures*) and identifies the goodness of outcomes with satisfaction of individual preferences. These commitments are neither neutral nor uncontroversial. Consequently, they question the moral basis of the concern with efficiency, and whether it is any less controversial than the moral commitments that lie behind equity.
3. Politicians and non-economists talking about welfare employ concepts that do not easily translate into the language of standard economic theory. Ideas of fairness, opportunity, freedom, and rights are more important in policy making than individual preference rankings. Equating welfare with the satisfaction of

preferences (which may be short-sighted or ill-informed) begs questions of justified paternalism. They question the quality of a world in which our humanity was always under the control of rational calculation.

4. In practice, positive and normative concerns are often intermingled in policy advice.

They point out that economics embodies a commitment to a certain mode of modelling and to a normative theory of prudence. The theory of rationality is already a fragment of the theory of morality. But the view of rationality that economists endorse - utility theory - may not even be compatible with moral behaviour, and does not provide a rich enough picture of individual choice to permit one to discuss the character, causes and consequences of moral behaviour. While they claim that economists need not aspire to provide a general theory of human action, this is precisely what many economists implicitly assume that they can do.

## THE PRIVILEGED STATUS OF SCIENCE

The previous section recounted the attempt to distinguish between scientific and normative discourse on the assumption that scientific discourse was more privileged than normative discourse, an attempt that was strongly rejected. The account now turns to consider what can be said about the status of science in general, and of economic 'science' in particular? The standard view in the middle of the nineteenth century was that scientific investigations begin in the free and unprejudiced observation of facts, progresses by inductive inference to the formulation of universal laws about those facts, and finally arrive by further induction at statements of still wider generality known as theories.[97] These laws and theories are supposed to be checked for their truth content by comparing their empirical consequences with all the observed facts, including those with which they began. Associated with this view of science was a conception of scientific explanation derived from the deterministic paradigm of classical mechanics. Scientific progress was seen as the inclusion of more and more kinds of phenomena under laws of greater and greater generality. It was a view of science that did not mention the history of science and which can not be reconciled with the history of science. But this view of science began to break down under the influence of Mach, Poincare and Duhem, and has been largely destroyed by Popper, Polanyi, Hanson,

Toulmin, Kuhn, Lakatos, and Feyerabend.[98] No generally accepted alternative has emerged, however.

Popper rejected attempts to distinguish the meaningful from the meaningless and divided all human knowledge into two mutually exclusive classes, labelled science and non-science.[99] For Popper, science is distinguished by its method of formulating and testing propositions, not its subject matter, or a claim to certainty of knowledge. But Popper draws no absolute line between science and non-science as falsibility and testibility are matters of degrees. All 'true' theories are merely provisionally true, having so far defied falsification. Importantly, no individual scientific hypothesis is ever conclusively falsified. As any particular hypothesis is tested in conjunction with auxiliary statements, there can never be any certainty that the hypothesis, itself, has been refuted. For this reason, Popper suggested methodological limits on the methods that may be used to safeguard theories against falsification. Consequently, for Popper there is no certain empirical knowledge, whether grounded in our own personal experience or in that of mankind in general. Because it prescribes sound practice in science, Popper's methodology is plainly normative.

Consistent with the account given in the preceding section, Kuhn's *The Structure of Scientific Revolutions*, in looking at the history of scientific practice, concluded that all science is based on a professional agreed framework of unprovable assumptions about the nature of the physical universe, not simply on empirical facts.[100] These assumptions are subject to radical change. This framework or paradigm is the constellation of beliefs, values, techniques and so on shared by a given scientific community. Radically new theories arise not as a result of verification or of falsification but by the replacement of a hitherto explanatory model, or paradigm, by a new one. 'Normal science', the day-to-day problem-solving within an orthodox theoretical framework, is the rule, while revolutionary science, or the overthrow of a paradigm as a result of repeated refutations and anomalies, is the exception in the history of science. This 'normal science' uses the same commonplace methods that the rest of us use in day-to-day life. For example, examples are checked against criteria, data is fudged to avoid the need for new models , and guesses, formulated within the current jargon, are tried out in the search for something which covers the cases that cannot be fudged.[101] Consequently, for Rorty, the moral that seventeenth-century philosophers *should* have

drawn from Galileo's success was that scientific breakthroughs were not so much a matter of deciding which of various alternative hypotheses are true but of finding the right jargon in which to frame hypotheses in the first place.[102]

Normal science is a thoroughly social process in which the problems to be examined, and the general form of the solution should take, is the result of agreement among a scientific community. Consequently, normal science is a self-sustaining, cumulative process of problem solving within the context of a common analytic framework. The breakdown of normal science is marked by a proliferation of theories and by methodological controversy. In this climate, a new framework appears that offers a decisive solution to hitherto neglected problems. Conversion to the new approach takes on the nature of a religious experience. As the new framework achieves dominance it becomes the normal science of the next generation. Kuhn subsequently acknowledged that his earlier description of scientific revolutions involved some rhetorical exaggeration. Paradigm changes during scientific revolutions do not imply total discontinuities in scientific debate. In this later account, scientific development is characterised by overlapping and interpenetrating paradigms, some of which may be incommensurable. Paradigms do not replace each other suddenly rather they achieve dominance in a long process of intellectual competition. Nevertheless, his stress on the role of normative judgements in scientific controversies, and sociological factors like authority, hierarchy, and reference groups, remains, along with a mistrust of the role of cognitive factors as determinants of scientific behaviour.[103]

There appears to be agreement on some essential points among the dissident accounts in the philosophy of science.[104] Strict justification simply cannot be achieved. The demand for ultimate justification relies on the belief in absolute distinctions between logic and language, language and reality, and theory and practice. These beliefs are untenable. In particular, we cannot stand outside our current language and structure of thought. Thus, ultimate justification is not achievable, as is inquiry free of presuppositions. Consequently, the belief that scientific knowledge is an accurate representation of reality has to be abandoned. As Rorty put it:

> "We understand knowledge when we understand the social justification of belief, and thus have no need to view it as accuracy of representation."[105]

The attempt to isolate science from non-science through the use of words like 'objectivity', 'rigour', and 'method' assumes that scientific success can be explained in terms of discovering the language of nature. Galileo, in claiming that the book of nature was written in the language of mathematics, meant that mathematics worked because that was the way things really were.[106] For Rorty, this was simply a bad metaphor. Rather, Galileo's reductionistic, mathematical vocabulary just happened to work, something which lacks a metaphysical, epistemological, or transcendental explanation.[107] This is a fairly strong claim. It is not necessary to go all the way with Rorty in order to accept that the only useable notion of objectivity is agreement, not 'mirroring'. What is clear is that the extent to our mathematical vocabulary matches that of nature, or indeed, whether nature can reasonably be described as having a vocabulary, will always remain problematic.

It follows that empirical sciences cannot claim an essential grasp of reality and thus a privileged status. It also follows, that sociology, political science, or even philosophy cannot claim to be objective and rational in a way that moral philosophy, aesthetics and poetry are not.[108] In both cases, justification is a search for persuasive arguments, a fully social phenomenon, not a transaction between the inquirer and reality. In this connection, Pierce[109] referred to the "indefinite Community of Investigators" while Mead[110] spoke of the "Community of Universal Discourse". When it comes to matters of the basic structures of society and major issues of public policy, this community is to be found in the ordinary citizens of the society, not in some idealised version of inquirers, some intellectual elite, who would be the equivalent of Plato's guardians.

Summing up the above, it can be concluded that the claim that science has a privileged epistemological status in virtue of its empirical basis can not be sustained. Rather, scientific inquiry and normative theorising use much the same approach.

## THE EXCESSIVE FAITH IN RATIONALISM

What we have arrived at is not some minor quibble about the philosophy of science but a fundamental attack on the whole Enlightenment project. One of the leading critics of Modernity, Stephen Toulmin[111] provides an account in which the origins of Modernity are linked to the rise of the nation state. The philosophers of the seventeenth century,

particularly Galileo in physics, Descartes in epistemology and Hobbes in political theory, committed western society to new and *scientific* ways and the use of more *rational* ways of dealing with the problems of life and of society. It was assumed that uniquely rational procedures existed for handling the intellectual and practical problems of any field of study, procedures which involved setting aside superstition, mythology and tradition and attacking problems free of local prejudice and transient fashion. But, as will be shown, such philosophical theories overreach the limits of human comprehension.

Prior to 1600, theoretical inquiries were balanced against discussions of concrete practical issues.[112] Indeed, sincerely religious Renaissance humanists like Montaigne and Erasmus criticised claims to theological certainty as being presumptuous and dogmatic. The rediscovery of classical learning had increased their understanding of the wide diversity and contextual dependence of human life. Consequently, they showed a new open-minded, sceptical tolerance along with practical doubt about the value of theory in such fields as theology, natural philosophy, metaphysics or ethics. Additionally, their awareness of the limits of our practical and intellectual powers, in particular of our ability to reach unquestioned Truth or unqualified Certainty, discouraged dogmatism. Thus it was best to concentrate on accumulating a rich perspective of the natural world and human affairs, suspending judgment about general theory.

The humanists saw philosophical questions as reaching beyond the scope of experience in indefensible ways, that we can claim certainty about nothing.[113] The similarity between this humanist position and that of Rorty's is obvious. For the humanists, this uncertainty reflected the attitude of Aristotle for whom the good had no universal form. Consequently for him, sound moral judgement always respected the detailed circumstances of specific kinds of cases.[114] Because human life did not lend itself to abstractions, Aristotle took a broader view of political philosophy than Plato and subsequent Enlightenment philosophers. Indeed for Aristotle, ethics was not a field for theoretical analysis but for practical wisdom, *phronesis*. This modesty was part of the price of our being human and not gods. Indeed, throughout the Middle Ages and the Renaissance, it had been understood that problems in social ethics were not to be resolved by appeal to any single and universal 'tradition'. Multiple considerations and

coexisting traditions need to be weighed against one another using all the available resources of moral thought and social tradition.

In contrast, the dream of seventeenth century philosophy and science was Plato's demand for *episteme*, or *theoretical grasp*. Toulmin[115] explains that seventeenth century Europe was in a state of general crisis. The theological pressures of the Reformation and seventeenth century science narrowed the scope for reasonable debate, limiting *rationality* to theoretical arguments that achieve a quasi-geometrical certainty or necessity. In their hope to bring all subjects into formal theory, they altered the language of Reason, words like 'reason', 'rational', and 'rationality',in subtle but influential ways.[116] Philosophers became increasingly committed to abstract universal, timeless theories, setting aside serious interest in the different kinds of practical knowledge, the oral, the particular, the local and the timely (and the present author would add, the personal). Rather, they concentrated on the formal analysis of chains of written statements, not the circumstantial merits and defects of persuasive statements. In the process, ethics was turned into a branch of theoretical philosophy. With the invention of ethical theory, dogma acquired an imperative sense, with moral questions having unique, simple, and authoritative answers. This belief remained typical of the rationalist claims of modern philosophy up until the 1950s.

Toulmin, rejecting contextual free inquiry, examines the circumstances in which this narrowing occurred. The assassination of the tolerant King Henri IV of France in 1610 undermined tolerance as a way of defusing denominational rivalry. It marked the shift from humanism to more rigorous dogmatic modes of thought. Increasingly, those with political and theological authority no longer saw tolerance and pluralism as a viable intellectual option, and finally in 1618 general war broke out across central Europe lasting 30 years. The unacceptability of uncertainty had led to an active distrust of unbelievers and to a belief in belief itself. Thus it became urgent to discover some rational method of demonstrating the truth of philosophical, scientific or theological doctrines, particularly the theological doctrines that had been the prime occasion for the religious wars. Interestingly, Toulmin speculates that the assassination of 1610 may have had a direct influence on the young Descartes.

In classical Greece, philosophy had recognised two distinct kinds of order, an order of nature or *cosmos* and an order of society or *poli,* but stoic philosophers fused theses orders into a single order, a *cosmopolis*. For them, everything in the world manifests an order that expresses the Reason that binds all things together. In the intellectual crisis of the seventeenth century, this view gained dominance. The search for certainty involved a shift away from practical issues to an exclusive concern with the theoretical. Thus, Descartes set out to place the central areas of human knowledge on foundations that were clear, distinct and certain, scrapping our inherited concepts, and starting again, using rationally validated methods having the necessity of geometrical proofs. Newton's account of the solar system followed the methodological example set by Descartes. This Cartesian program swept aside the uncertainties and hesitations of the sixteenth century in favour of new mathematical kinds of rational certainty and proof. Logical analysis was separated from, and elevated far above, the study of rhetoric, discourse and argumentation. Inspired by Descartes, moral philosophy followed the theoretical road of natural philosophy, relegating practical ethics to a second place. It set about clarifying and distinguishing the concepts of ethics and formulating the universal, timeless axioms that, they assumed must lie at the base of any rational system of ethics. Similarly, academic jurisprudence developed formal and theoretical goals. In political theory too, a new style of political theory emerged, of which Hobbes'theory is paradigmatic. This flight from the particular, concrete, transitory, and practical aspects of human experience became a feature of cultural life in general, and of philosophy in particular. From this perspective, the essence of humanity was seen as the capacity for rational thought and action while the emotions were seen as frustrating or distorting reason. This distrust of emotions is still current and reinforces the Cartesian, or *calculative*, idea of 'rationality'.

Of course, the very idea of humanity having an 'essence' is being undermined, while recent research on the cognitive abilities of primates is undermining the claim that it is rationality that radically distinguishes humans from other animals. The questioning of these ideas of rationality and reason are at the heart of the contemporary critique of Modernity. This critique calls into question the claim that moral and legal reasoning could imitate geometrical forms of argument. The claims for such deductive reasoning disguises the moral or political choices that are inevitable between possible inferences in long chains of reasoning. Likewise, deductive reasoning, by using contradictory

assumptions, can produce radically different ethical systems and geometrical forms of argumentation give us no means of choosing between those assumptions. Indeed, such forms of reasoning have, themselves, come under sustained attack. With the realisation that alternative, useful geometries were possible, mathematicians and geometers have recognised that geometries are formal logical systems, based on arbitrary assumptions, whose only necessary characteristics were self-consistency with no necessary connection to reality. Thus, it was possible to conceive of different logics like the several non-Euclidean geometries. Consequently, for Lewis:

> "There are no 'laws of logic' which can be attributed to the universe or to human reason in the traditional fashion. . . Rather all logical systems and 'laws' were human conventions honoured only for their utility. . . Logical truth could not possibly serve as an ultimate criterion since the nature and form of that truth necessarily depended upon the prior choice of a particular logical system."[117]

To make matters worse for the logicians, Godel demonstrated that it was theoretically impossible to produce any final solution to the problem of the foundations of mathematical logic. It was not possible for an axiomatic system to be self-contained.[118] Mathematics was also simply a tool created by the human mind with no connection to any metaphysical or theological absolutes.[119] All logical and mathematical reasoning was thus shown to be purely tautological, the elaboration of implications contained in the definition used according to problematic, socially-created, formal systems of thought. This critique of logic and mathematics undercuts all pretensions to a priori and absolute knowledge.[120] For Purcell, summarising Dewey, James and Peirce, truth :

> "was not to be found in the abstract logic of ideas, but in their practical consequences. There were no absolute or *a priori* truths, only workable and unworkable hypotheses."[121]

The very idea that human reason could discover immutable metaphysical principles that could explain the true nature of reality was an illusion.

For his part, Richard Rorty denies the existence of an 'Archimedean point' in human understanding that would provide a foundation to all knowledge. We must give up our desire for a uniform and normalised sense of truth. Every culture is entitled to judge matters of rationality by its own lights. MacIntyre requires us to look behind questions

of abstract rationality and ask whose conception of rationality is being used in any situation.[122]

Rorty points out that we are the heirs of three hundred years of rhetoric about the importance of distinguishing sharply between science and religion, science and politics, science and art, science and philosophy, and so on. This rhetoric has formed the culture of Europe. In every sufficiently reflective culture, there are those who single out one area of practice as the paradigm human activity.[123] In the Western philosophical tradition, this paradigm has been *knowing* – possessing justified true belief, or beliefs so intrinsically persuasive as to make justification unnecessary. However, on the periphery there have been figures who distrust the idea that humankind's essence is to be a knower of essences. Even when we have justified true belief we may have no more than conformity to the norms of the day. Consequently, they have maintained an historicist sense of the transience of ideas along with the realisation that the latest vocabulary may just be one of the potentially limitless vocabularies in which the world can be described. Words take their meanings from other words, not their representative character, and vocabularies acquire their privilege from the people who use them not because they are transparent to the real.

For Rorty, the problems of Western philosophy have been set by visual imagery. The notion of a human being whose mind is an unclouded mirror, and who knows, is the image of God. Thus the human aspiration towards objective truth is an attempt to escape from humanity, to become god-like. Indeed, the institutionalised structures of command in the West are always legitimised by invoking abstract transcendental justifications, like God, or natural law, or a generalised will of the people.[124] Western art, literature and philosophy shares the idea that, beyond the empirical, mundane realm lies a greater reality - immovable, permanent, and absolute. Christianity and other forms of transcendentalism have shaped the reality in which Westerners live. At the beginning the transcendental absolute was an anthromorphised God, but, through the Enlightenment, God was replaced by Nature and natural laws which continued to occupy the transcendental plane of absolute truth. This provides our fundamental understanding of the ordering of the world, and our vocabulary of legitimation. This patterning is so taken for granted that it is difficult to imagine a world-view put together

in any another way. As indicated above it is this world-view that is under serious challenge.

In contrast, the Confucian civilisation of South East Asia was not formed by monotheism, and does not conceptualise a meaningful level of human action and causation beyond the world of human experience. Chinese cosmology not only lacked monotheism, but also lacked a transcendental level.[125] There was, instead, a cosmological ordering of this world, represented by the harmonious hierarchical interrelations of heavens, earth, and mankind, a notion of order that excludes the Western notion of law. In the Chinese world-view, the harmonious cooperation of all beings arose from the fact that they were all parts in a hierarchy of wholes, forming a cosmic pattern. What they obeyed were the internal dictates of their own natures, and not the orders of a superior authority external to themselves. In China, there is no God or God-given laws, and no transcendental level that leaders could use to justify their claims to power. Consequently, a different vocabulary of legitimation was developed, a vocabulary in which justifications for power were based on the requirements for natural harmonies in this world. Power over another was justified in terms of one's obedience to one's position in a universal relational order. There is, thus, a close connection between the postmodernist challenge to Western rationalism and Eastern challenge to Western economic hegemony, the two parts of the paradigm shift noted earlier.

Criticism of this Western transcendentalism is central to Rorty's critique of rationalism. Western philosophy sees itself as the attempt to underwrite or debunk claims to knowledge made by science, morality, art or religion, on the basis of its special understanding of the nature of knowledge and of mind.[126] In this tradition, to know is to represent accurately what is outside the mind. Consequently, the central concern of Western philosophy has been to construct a general theory of representation. But the very idea of an autonomous philosophical discipline separate from and sitting in judgement on religion and science is quite recent. It originates with Descartes' invention of 'mind' as a separate entity in which processes occur. Locke made Descartes's newly contrived mind into the subject matter of a 'science of Man' – moral philosophy as opposed to natural philosophy.[127] Kant contributed the idea of philosophy as a tribunal of pure reason upholding or denying the claims of the rest of culture. But this search for the foundation of knowledge originates in an assumed

compulsion to believe when staring at an object. The way to have accurate representations is to find, within the Mirror of the mind, a special privileged class of representations so compelling that their accuracy cannot be doubted. Thus, this modern Cartesian-Kantian pattern is an attempt to find ahistorical conditions for any possible historical development. Consequently, for intellectuals philosophy became a substitute for religion. The author insulates his beliefs from Rorty's attack by claiming that God's transcendence precludes us from the sort of absolute knowledge derived from the rational discourse associated with that Western transcendentalism. Such knowledge is a matter of revelation, not dialectic. Interestingly, Rorty's attack on the methods of rationalism, is itself, an unavoidable echo of the system that he attacks.

Wittgenstein, Heidegger, Dewey and Rorty see the possibility of a post-Kantian discourse in which there is no all-encompassing discipline which legitimises the others.[128] Rather, justification is a social phenomenon, a conversation, and not a transaction between a knowing subject and reality. Consequently, words like 'rational', 'objective' and 'cognitive' are simply marks of distinction applied to matters about which there is agreement. This conversational justification is naturally holistic, in contrast to the reductive and atomistic habits of the epistemological tradition. It is associated with the dissolution of the philosophical dualisms that have characterised theoretical debate since the Enlightenment. The attempt to devise mutually exclusive categories has come to seem less and less convincing.[129] Rorty concludes that the attempt since the Greeks to explain 'rationality' and 'objectivity' in terms of the conditions of representation is a self-deceptive effort to eternalise the normal discourse of the day. It follows from the Greek belief that what differentiates humans from other animals is our ability to *know* universal truths, numbers, essences, the eternal. Thus, to suggest that there are no universals is to endanger our claimed uniqueness.

This conversational view of truth and knowledge does not devalue human knowledge. It simply recognises that nothing can count as justification except by reference to what is already accept, and that there is no way to get outside our beliefs and language to find an alternative test to coherence.

Hermeneutics involves the notion of culture as a conversation rather than a structure erected upon foundations. It abandons the belief that all contributions to a discourse are

commensurable; that is, can be brought under a set of rules that tell us how to reach rational agreement. Within this approach to knowledge, Rorty suggests a distinction between normal discourse and abnormal discourse, generalising Kuhn's normal and revolutionary science. Normal discourse is that which is conducted within agreed conventions while abnormal discourse involves ignorance of, or the setting aside of, these conventions. No discipline can explain such abnormal discourse.

Western transcendentalism has also been closely associated with personalised, charismatic authority.[130] Greek philosophy, Christianity, and by the Enlightenment, all defined the right to teach by the teacher's special knowledge of a universal message.[131] Since the Enlightenment, the guardian of truth and justice was no longer the priest, but the intellectual, claiming a special right to speak for humanity, a magisterium. This is a claim to authority. Indeed, one of the main reasons that truth and power have been posed as separate is to guarantee the authority of those who proclaim this separation.[132] This abandonment of the quest for commensurability is a particular threat to their role as cultural overseers, the Platonic philosopher-kings, who know about the ultimate context of knowledge.

From this postmodernist perspective the sciences are a confederation of enterprises, with methods and patterns of explanation to meet their own distinct problems, not the varied parts of a single, comprehensive, 'unified science'.[133] The Platonic image of a single, formal type of knowledge is replaced by a picture of enterprises that are always in flux, and whose methods of inquiry are adapted to the nature of the case. Importantly, the belief that we can start again by cutting ourselves off from inherited ideas is as illusory as the hope for a comprehensive system of theory. The hope for certainty and clarity in theory has to be balanced with the impossibility of avoiding uncertainty and ambiguity in practice. But we need to reappropriate the reasonable, tolerant, but neglected legacy of humanism more than we need to preserve the systematic, perfectionist legacy of the exact sciences. In particular, formal calculative rationality can no longer be the only measure of intellectual adequacy: one must also evaluate all practical matters by their human 'reasonableness'. Consequently, for Toulmin:

> "the charms of logical rigour must now be unlearned. The task is not to build new, more comprehensive systems of theory with universal and timeless

> relevance, but to limit the scope of even the best-framed theories, and fight the intellectual reductionism that became entrenched during the ascendency of rationalism. It calls for more subdisciplinary, transdisciplinary, and multidisciplinary reasoning."[134]

Toulmin believes, in particular, that biology provides less constricting analogies for thinking about social relations than physics does. In the organic world, diversity and differentiation are the rule and not the exception. The universality of physical theories is rare.

Such positivist social science has suppressed political and moral discourse by appropriating the prestige associated with the natural sciences and conferred a privileged position on the status quo and on the professional expert with a capacity for judgement based on an unstainable claim to technical expertise, neutrality and impartiality. All of this should lead us to be critical of abstract and impersonal values, of universal solutions and of logical imperatives within economics, the law, and social life more generally.[135] Thus we should be wary of grand theory, sacred rules, and mystical absolutes which have little connection to reality. For, as Horowitz confirms, the belief in the explanatory possibility of general laws capable of making predictive statements in the social sciences has plummeted:

> "The result has been a dramatic turn towards highly specific 'thick description' in which narrative and stories purport to substitute for traditional general theories. . . a complex, multi-factored interdependent world has lost confidence in single-factor 'chains of causation' that were embedded in most nineteenth-century explanatory theories."[136]

The above account involves a rejection of the arrogance and dogmatism of past intellectual optimism and pretension, the lack of intellectual humility that seems to have infested the entire Western intellectual tradition, particularly since the Enlightenment. As with the Reformation, this lack of a convincing theoretical base, and the radical disagreement it engenders, undermines the magisterium of the theorist. We need to take seriously the possibility that the total social environment is too complex, and the human mind too limited, for us to understand,[137] a view with echoes in Hayek,[138] Nielbuhr,[139] and more recently in Arthur.[140]

This critique also has the effect of undermining the credibility of much recent economic theorising, particularly its general use at a very high level of abstraction to support arguments for a minimalist government. Thus in the next section, we will turn to a discussion of the status of economics and its usefulness in public policy formulation.

## THE QUESTIONABLE STATUS OF ECONOMICS WITHIN THE HUMAN CONVERSATION

This thesis has already rejected the proposition that there can be such a thing as positive economics. Economics, particularly its application to public policy choices, is inherently normative. But the systematic investigation of social phenomena, including economic phenomena, cannot be decried simply because it is normative. But it is a lot more difficult that it appeared to Enlightenment philosophers. At best economics is a normative science, but given the false connotations of the word 'science' in English, it might be better to rename it a normative discipline. The dominant school of economics, neo-classical economics, has involved the application of a particular metaphor to social affairs. This, in itself, is not illegitimate. Indeed, there is no other way of proceeding except through such metaphors. But the Newtonian metaphor is only one, among a possibly countless number of such metaphors, and might simply be an inappropriate metaphor to choose. After all it has been replaced in the physical sciences. It also follows from the earlier argument that there are no final criteria for determining its worth. The criteria that are used in practice include its simplicity, its usefulness and its elegance, but our understanding of these cannot be tied down. They also are matters of human invention. It is, consequently, up to the advocates of the use of the Newtonian metaphor in economics to convince the rest of us of the worth of their project, independent of the 'truth' claims, that were simply assumed by the Enlightenment.

There is a danger that a hermeneutical approach to economic analysis could be used to encouraging the uncritical acceptance of modern economics.[141] But the hermeneutical approach would not oppose the call for much greater empirical testing of economic theories. The falsification criteria is central to the coherence test applauded earlier. While still much a minority view within the economics profession, there are those that are taking the hermeneutical approach seriously. Thus, Klamer and McCloskey[142] claim

that economists have begun to see that their talk is rhetorical, an honest argument directed at an audience. But this does not warrant a casual indifference to truth as newly understood. Consequently, they question what constitutes economic knowledge. In so doing, they point to specific influential papers as examples; one in the rhetoric of the hypothetico-deductive model of science, but which looks more like a charming metaphor; and another, in the rhetoric of empirical finding, but which looks like a reading of history. Indeed, prior convictions appear to have a large effect on the econometric results of normal economics. They question the point of publishing one's prior convictions dressed up as findings. They go on to argue that "all conversations are rhetorical." and to recommend "a rhetorically sophisticated culture for economists, following Richard Rorty 'in which neither the priests nor the physicists nor the poets nor the Party were thought of as more 'rational' or more 'scientific' or 'deeper' than one another."[143] They suggest, however, that being a good conversationalist asks for more than does following some method, it asks for goodness. Presumably this means serious adherence to the norms of the scientific sub-culture, including the subjection of claims to serious and honest examination.

Heilbroner[144] reminds us that for Adam Smith rhetoric, the art of speaking effectively was the rock on which economics stands. Hilbroner is also sympathetic with McCloskey's attack on the pretentious scientism in which economists couch their mutual persuasions. He sees such scientism as dangerous in that it conceals, or minimises, the elements of judgement and moral valuation that are an intrinsic part of economics. For Heilbroner, economics is ideological, by which he means an earnest and sincere effort to explain society as its ideologists perceive it, an effort to speak the truth at all costs:

> "What is 'ideological' about such an effort is not its hypocrisy but its absence of historical perspective, its failure to perceive that its pronouncements are a belief system, conditioned like all belief systems by the political and social premises of the social order."[145]

From this perspective economics is intrinsically normative and directive in that it embodies the constitutive beliefs of its parent society. These beliefs are intrinsically political, in part of the result of the self-justifying intentions of their spokespersons. But it is also because all societies presuppose structures of subordination and

superordination, of cooperation and conflict-resolution, and of the justification and use of power. Consequently, all systems of social thought must contain that political character, knowingly and explicitly, or unknowingly and in disguise.

Of course, many economists dismiss methodological questions on the grounds that all the effort to determine whether economics is a science or not, has never advanced economics in any practical sense.[146] But this is not a tenable position in this inquiry: in practice economists do pronounce with apparent authority on policy issues. What is the source of that authority?

## CAN MORAL PHILOSOPHY ASSIST ECONOMISTS IN PROVIDING POLICY ADVICE?

In the face of these philosophical and methodological conclusions, the extent to which economists can have anything to say on public policy development as a result of their 'economic expertise' is deeply problematic. It is at this point that we encounter the superficially helpful suggestion that economists should turn to the study of moral philosophy if the are to offer relevant policy advice. The suggestion assumes that moral philosophy can produce *rational* answers to the moral questions raised by public policy questions. But it is that very concept of rationality that is under question. In any event this search for basic principles of ethical action has run into the sand. The Enlightenment project, which began as the rejection of religion as the guarantor of legitimacy and meaning, dismantled the metaphysical and teleological superstructures that held the medieval and classical worlds together. But that project's search for a replacement has collapsed and left a vacuum. As MacIntyre concludes:

> "in spite of the efforts of three centuries of moral philosophy and one of sociology, [we] lack any coherent rationally defensible statement of a liberal individualist point of view."[147]

It has privatised all sources of meaning and belief ensuring that no other tradition can assert itself as the sole claimant of a shared and public conception of the good.[148]

Indeed, why should we attach more weight to the pronouncements of philosophers on moral issues than those of other people?[149] There is little reason to believe that the academic practice of moral philosophy has the authority to determine the style and

method of thinking on moral matters, what the serious problems are, and how they should be characterised.[150] The normative assumption underlying this form of justification is never, itself, justified. Apparently we are somehow *required* by reason to accept certain basic moral injunctions. But where reason acquires this power to compel is never explained, simply assumed.

In any event, moral philosophers do not start from zero when they begin their system-building. They start from an impression of the everyday social reality embodied in culture, language and tradition. At the end of the day, Rawls seeks to justify the norms that he thinks are the critical ones in *his* society. So do Plato and Aristotle. For his part Habermas' searches for ideal speech conditions, but since we do not live in such a world, we cannot know what would command agreement, and thus what to recommend.[151]

This turn to moral philosophy is no turn at all. It is where economists have been all along. Indeed, neo-classical economics is inherently utilitarian. An appeal from economics to utilitarianism is therefore no more than an appeal from Caesar to Caesar. It is just that most economists have failed to recognise the fact. Indeed, it is simply a further appeal to the failed Enlightenment project noted earlier. In any event, in moral philosophy, there are different and incompatible schools and little is uncontroversial.[152] Moral justifications take many different forms and people give many different justifications for the moral judgements that they make. Indeed, moral disagreements are the essence of political debate. These conflicting moral traditions are embedded in our moral vocabulary, culture and tradition:

> "we live with the inheritance of not only one, but a number of well integrated moralities. Aristotelianism, primitive Christian simplicity, the puritan ethic, the aristocratic ethic of consumption and the traditions of democracy and socialism have all left a mark on our moral vocabulary."[153]

These incompatible traditions, when taken with the Enlightenment's privatisation of morality, means that moral values can be a matter for individual choice. Arguments alone can give no definitive answer to moral questions, and all such philosophers do is disguise the answers they want to give, as the verdict of philosophical inquiry. Thus, policy advisers are in a position to pick their school of moral thought to suit their

rhetorical and ideological purposes, hiding their choice behind a cloud of impressive rhetoric. Hausman and McPherson also warn us of the many dimensions of moral appraisal and against reducing these many dimensions to one or two.[154]

This appeal to moral theory leads to a reliance on theoretical reasoning to explain moral values rather than actual reflection on experience. At the heart of such theoretical accounts remains the idea that social life is logically secondary to an unconstrained non-social life in which what people do is a matter of their individual 'natural' drives. But this psychological vocabulary presupposes an established web of social and moral relationships.[155] Indeed, moral justifications are always justifications to somebody who accepts the relevant standard.[156]

Indeed, MacIntyre[157] points out that contemporary moral philosophy is characterised by radical disagreement, interminable arguments and incommensurable premises. There is no rational way of securing moral agreement in our culture. Thus, we have competing theories, for example deontological ones like those of Rawls, Nozick and Gerwith which focus on the individual and usually take duty or rights as the basis of morality. And we also have teleological theories which judge actions on the basis of their consequences alone. From this teleological perspective we can only know whether something is right if one knows the fundamental aims or ends that our activities are to promote.

Each of the arguments MacIntyre cites is logically valid, but the premises are such that there is no way of weighing their respective claims.[158] These premises employ quite different normative concept so that their claims are of different kinds. But there is no established way of deciding between these claims in our society. The invocation of one premise against another is pure assertion and counter assertion. The different conceptually incommensurable premises of rival arguments can easily be traced to a wide variety of historical origins, but we should not underestimate the complexity of the history and ancestry of such arguments. Indeed, we need to recognise that the various concepts which inform our moral discourse were originally at home in larger totalities of theory and practice in which they enjoyed a role and function supplied by a context of which they have now been deprived.

MacIntyre complains that moral philosophy is often written as though the history of the subject were only of secondary and incidental importance. Some philosophers have even written as if moral concepts were timeless, limited, unchanging, determinate species of concept, necessarily having the same features throughout their history. The history of ethics is instructive because moral concepts change as social life. For example, the list of virtues in the *Nicomachean Ethics* reflects what Aristotle takes to be the code of a gentleman in contemporary Greek society.[159] To understand a concept is always to learn the grammar that controls the use of such words and so to grasp the role of the concept in language and social life. But there are continuities as well as breaks in the history of moral concepts. The complexity is increased because philosophical inquiry, itself, plays a part in changing moral concepts.

Consequently, it is not clear that an investigation of how a concept is used will yield one clear and consistent account. Indeed, if part of our ethical knowledge is tacit, as was argued in Chapter 2, it may not even be possible to articulate the concepts successfully. Moreover, the current state of moral philosophy involves a whole range of interconnected differences of views. The parties to these different views will not agree that they could be settled by empirical inquiry into the way in which evaluative concepts are actually used. The ordinary use of moral concepts may on occasions be confused, or even perverted through the influence of misleading philosophical theory.

Indeed, Rorty questions whether we already possess the moral vocabulary necessary to determine whether we are doing justice to others.[160] He argues that since Kant and Bentham moral philosophy has identified moral perfection with doing justice to others taking for granted that we already possess the necessary vocabulary. From this perspective the only remaining problem is to split the difference between Kant and Bentham – between the categorical imperative and the utilitarian principle as formulations of 'the moral law'. This reduction of morality to 'the moral law' has twin roots in the Christian and the scientific traditions. On the one side, it is an attempt to update and make respectable the Judeo-Christian idea that all the laws and the prophets can be summed up in respect for one's fellow humans. On the other hand, it is an attempt to secularise ethics by imitating Galileo's secularisation of cosmology, finding nice, elegant little formulae with which to predict what will happen. Consequently, when Aristotelians, Kierkegaardian Christians, Marxists, or Nietzscheans argue that

there is more to moral philosophy than that – that we may not yet know the words which would permit us to deal justly with our fellows – they are said to confuse morality with something else, something 'religious' or 'aesthetic' or 'ideological'. When philosophers protest that what is needed is not rules that synthesise the utilitarian principles and the categorical imperative but rather a morally sensitive vocabulary, they are seen as doing something rather odd and 'literary', not to be confused with moral theory.

For Rorty, the difficult moral cases are ones where we grope for the correct words to describe the situation, not ones where we are torn between the demands of two principles. The fiction of real moral and political questions being resolved by finding the morally relevant features of the situation, those that can be described in the vocabulary in which classical moral principles are stated, should not be taken seriously. We should not think of our distinctive moral status as being 'grounded' in our possession of mind, language, culture, feeling, intentionality, textuality, or anything else. These numinous ideas are simply declarations of our awareness that we are members of a moral community, phrased in pseudo-explanatory jargon. This awareness is something which cannot be further 'grounded', it is simply taking a certain point of view on our fellow humans. It is the ability to wield complex and sensitive moral vocabularies that counts as moral sophistication. What makes the modern West morally advanced is not a clear vision of objective moral truths but its sense that we are creating morality, a moral text, rather than discovering nature's own moral vocabulary. What needs to be emphasised is that the moral vocabulary does not stand alone, but, in any culture, is supplemented greatly by endless narratives which aim to explain the way in which the vocabulary should be used.

This emphasis on the existing moral vocabularies stands as a healthy correction to the Platonic system building tendencies of Western rationalism. In this spirit, Haan looks to the construction of an empirically based, consensual theory of everyday morality.[161] This morality of everyday life in not a capacity that resides exclusively in individuals; it is social exchange in itself. For Haan, several Platonic ideas have obscured the simpler features of everyday morality. For example, it is assumed that for a moral theory to be adequate, it should provide clear and absolute guidance for all important problems of living. Consequently, formulations of everyday morality have usually been depreciated

as being relativistic and inferior. Similar to Toulmin, Haan argues that such absolute claims attract human beings because they seem to deliver the security of moral clarity. Associated with this is an assumption that a complete morality can only be known to us when it is presented by a higher authority or by morally elite figures. The consequence of this way of thinking is that leaders can then employ morality and manipulate guilt as an instrument of political control. People's deep commitments to their collectivities make them highly vulnerable and responsive to this form of manipulation. Leaders' public judgements of moral merit quell the efforts of the disadvantaged to promote their own good: those of lower status are guilty – intrinsically unworthy – and have not earned the right to expect more. But for Haan, everyday morality has no other source than the experience and agreements of people themselves. Thus, she questions that moralities must be in the form of complete, formalised systems, rather than the more proximate forms that emerge from the details of human interchange. In such a morality of everyday life, specialists are not needed. Under the influence of Piaget's work, Haan believes that the mind is active, rational, and constructivist, and that therefore morality must be inductive and creative rather than compliant and rule deductive. Thus, 'moral character' as a fixed faculty now seems less likely than moral responsiveness as a sensitivity and skill in social interaction. This would seem to require an ability to access the appropriate social text.[162] In this connection, psychology is moving towards the explicit recognition that humans are thoroughgoing social beings from birth and that infants are far less egocentric than previously thought.

When social interaction is taken as the pivotal feature of morality, a different view of moral processes, decisions, guidelines, and individual capacities emerges. Moral dialogues occur continuously as major or minor events throughout the day and life of every person. People have a clear and strong expectation of engaging in moral dialogue as organising the patterns of social thought and interchange. Consequently, moral dialogue can be regarded as the prime moral structure. The question of why people are willing to consider others' moral claims has some empirical answers. Haan[163] considers that people are willing to consider the moral claims of others for the following interrelated, empirical reasons:

1. the need to conserve our view of ourselves as moral;
2. the mismatch between the moral person one thinks one is and the immoral person one is afraid one has been;

3. enlightened self-interest; and
4. integrity among people, a matter of good faith.

This interactive view puts citizens and society in the difficult role of constantly working to achieve moral agreements. In order to be moral, people must actually and authentically participate in building the morality they endorse and use. In particular, for Haan, a just society cannot exist without an interactive morality requiring equitable participation. The more remote justice is from the actual experience of people, the less sensible it is for them to accept society as morally legitimated. This is a position very close to that advanced by Habermas, shorn of its Platonic tendencies. It also has much in common with the evolutionary account of the development of moral order advanced in Chapter 2. But, it is not a position that rejects critical analysis, but it gives far greater weight to other forms of prophetic proclamation.

## CONCLUSION

Earlier we argued that self-interest is not the fundamental ordering principle operating in society. This was in response to the argument from many economists that social norms and social groups can be explained as a result of a voluntary contract between self-interested individuals who have made a rational calculation that cooperation was in their long-term interest. Rather it was claimed that human beings have always been social animals drawing their identity from their social relations and from their culture. Consequently, neither the self or society had explanatory priority. As a result, the methodological individualism inherent in the social contract idea could not be sustained. It as also argued that our moral and legal infrastructures was essential to the social and economic system, the economic system being seen as a sub-system in the social system. An evolutionary account was given of the development of that social system. The neglect of the social underpinnings of economic activity by contemporary economists is surprising given the weight of earlier discussion and account was provided in the last Chapter of the various ways in which that relationship has been described.

Chapter 4 has developed a critique of the foundations of economic rationalism, examining a number of closely interrelated themes. The Chapter has firstly examined

the historical emergence of the intellectual basis of modernity and economic rationalism recounting the waning of the medieval idea, inherited from Aristotle through Aquinas, that human beings were social and political beings necessarily involved in a network of social relations. This view was replaced by what was termed the Natural Law Outlook in which the Divine underpinnings of the inherited idea of Natural Law was gradually secularised. This was a trend associated with the developments of science and a desire to find a scientific and increasingly more natural explanation of the social order. Thus, appeals to reason and nature, both increasingly divinised, provided a source of meaning and justification as comprehensive as the religion that it had replaced. Social contract theory emerged to provide a Newtonian and individulistic account of the social and political system. Gradually, the concept of contract replaced law and custom as the source of law and social obligations. Locke's account with its emphasis on pre-social property rights was particularly agreeable to the property classes. While the various theories recounted did not add to a coherent whole they reflected the Enlightenment's ambition to produce a secular, naturalist and rational justification for our moral allegiances and social arrangements.

Economics is the inheritor of this tradition of scientific discourse. This leads directly to the question of what kind of discourse is economics. Is economics a positive science or is it a moral discourse? Notwithstanding the ambitions of Hobbes and Locke and their successors to found our moral institutions on science, over the last century economists have generally made a distinction between positive and normative economics, a distinction traced to Hume's distinction between facts and values. Normative economics involved the application of the positive science of economics to policy problems in which the choice of ends was seen as normative with positive economics addressing the best way of achieving those ends. It has been argued that it was a mistake to think that explanatory theories occupy a privileged epistemological position compared to normative theories. Indeed, there is no value free vocabulary. Thus it was concluded that the distinction between positive and normative economics cannot be sustained, and that economics is a moral science.

If economics is a moral science then what can be said about the status of science? It is clear that the positivist pretensions of science, in which scientific progress was viewed as the inclusion of more and more phenomena under natural laws of greater and greater

generality, have themselves been undermined. While there is not complete agreement among the critics of the positivist view of science, there is broad agreement on essential points. The belief that scientific knowledge is an accurate representation of 'reality' needs to be abandoned. Accuracy of representation is not achievable. Rather science is a social practice in which knowledge is socially constructed to produce coherence, a social practice which in the physical sciences happened to work. Consequently, the empirical sciences cannot claim an essential grasp of reality and thus a privileged status. This is no minor quibble but a fundamental attack on the whole Enlightenment project. What is involved is a decisive break in our world-view. In particular, the Newtonian mechanistic world-view has been undermined along with any sense of objective certainty in the physical sciences or the political-cultural sphere. As a consequence, we have to live a profound sense of historical relativism and the belief that there can be no over-arching absolute principle which can reconcile all the relativities of human thought and experience. In particular, the possibility of demonstrating the truth of ethical propositions has been undermined. This critique has also undermined the credibility of much economic theorising, particularly its use, at a high level of abstraction, to support arguments for a minimalist government, arguments which have their origins in Locke.

Within the economics profession there are those who are taking this hermeneutical view of science and of economics seriously. Others have sought refuge in moral philosophy as a means of supporting their policy recommendations. But, as might be expected from the critique of rationalism, moral philosophy is, itself, in disarray. In any event, it is where economists have been all along. Indeed, the idea that we already possess the moral vocabulary necessary for determining whether we are doing justice for others is disputed. It is the ability to wield a sophisticated moral vocabulary that counts, along with the awareness that we are creating, rather than discovering, morality.

It is against this setting that in the next chapter the thesis will turn to the historical background to the development of the doctrine of Freedom of Contract. It will be found that the development of that doctrine parallels the development of social contract ideas discussed in this chapter and relies on the same Natural Law Outlook.

[1]Cited Cox, Harvey, 1984, Religion in the Secular City, p38 (from Plurality of Worlds, 1686)

[2] Oakeshott, Michael, 1962, Rationalism in Politics and Other Essays, Methuen, London

[3] The phrase was used only once in Adam Smith's Wealth of Nations: *[He] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own self interest he frequently promotes that of the society more effectually than when he really intends to promote it*. Robert L Heilbroner, The Essential Adam Smith, 1986, W W Norton & Company, New York, p265

[4] Smith, Adam, 1976, The Theory of Moral Sentiments, Oxford University Press, Oxford, 36

[5] Passmore, John, 1994, personal communication

[6] Stark, Werner, 1962, The Fundamental Forms of Social Thought, Routhledge and Kegan Paul, London

[7] Frisby, David and Derek Sayer, 1986, Society, Ellis Horwood, and Tavistock Publications, London

[8] Stark, 1962

[9] Seligman, Adam B, 1992, The Idea of Civil Society, Princeton University Press, Princeton, New York

[10] Tawney, R H, 1921, The Acquisitive Society, Harcourt Brace, New York, pp12-14

[11] Selisman 1992

[12] Gascoigne, Robert, 1994, Contemporary Culture and the Communication of the Gospel, Plenaria '94

[13] Clark, C M A, 1992, Economic Theory and Natural Philsophy, E Elgar, Hants

[14] Lessnoff, Michael, 1986, Social Contract, Macmillan, Basingstoke

[15] White, Stephen K,1991, Cambridge University Press, Cambridge

[16] Clark, 1992

[17] Lessnoff, 1986

[18] Lessnoff, 1986

[19] Gough, J W, 1936, The Social Contract, Clarendon Press, Oxford. Gough points to the possible influence of sophists of ancient Greece among whom social contract views, that were highly individualistic and made use of the concept of a state of nature, had some currency. Gough tells us that much of the political philosophy of Plato and Aristotle was concerned to combat these subversive views. Thus, for Plato, every man has his station and duties while for Aristotle man is by nature a political animal. The state for Aristotle is not a mere living together in one place for mutual protection and economic exchange but is a moral association to develop man's highest faculties and enable him to live the good life.

[20] Stackhouse, 1999a

[21] Lessnoff, 1986

[22] Lessnoff, 1986

[23] Gouch, 1936

[24] Atiyah, P S, 1979, Rise and Fall of Freedom of Contract, Clarendon Press, Oxford

[25] Atiyah, 1979,

[26] Macpherson, C B, 1964, The Political Theory of Possessive Individualism: Hobbes to Locke, Clarendon Press, Oxford,

[27] White, 1991

[28] The relationship between the rulers and the ruled, and between the people themselves, have both been treated under the general heading of the social contract.

[29] Burrow, 1966

[30] Lessnoff, 1986

[31] Lessnoff, 1986

[32] Lessnoff, 1986

[33] Gough, 1936

[34] Atiyah, 1979

[35] Clark, 1992

[36] Clark, 1992

[37] Clark, 1992

[38] Selisman, 1992, p26

[39] Selisman, 1992,p25

[40] see David Hume, 1878, A Treatise on Human Nature: being an attempt to introduce the experimental method of reasoning into moral subjects and dialogues concerning natural religion, Longmans Green, London and Social Contract: Ernest Baker ed, 1980, Essays by Locke, Hume and Rousseau, Greenwood Press, Westport, Conn

[41] Atiyah, 1979

[42] Atiyah, 1979, p81

[43] Heilbroner, 1986, p141

[44] Seliman, 1992

[45] Smith, Wealth of Nations, Book II, Chapter II, cited Atiyah, 1979, p303

[46] Burrow, 1966

[47] Burrow, 1966, pp62-63

[48] Atiyah, 1979, p328

[49] Burrow, 1966, p70

[50] Bannister insists that many so-called social Darwinists such as Spencer were not Darwinists. He cites with approval Howard Gruber who argued that it was in harmony with Darwin's thinking that the struggle for survival must enhance cooperation and rational long-term planning for collective ends rather than short-sighted individualistic efforts for private gain. He goes on to say that there seems little grounds for assuming that Darwinism gave support to unbridled individualism, unregulated competition and laisssez-faire or brutality and force in social affairs. Robert C Bannister, Social Darwinism, 1979, Temple University Press, Philadelphia, p15-33

[51] Burrow, 1966 p216

[52] Burrow, 1966, p208

[53] Atiyah, 1979. Indeed, Malthus had written his *Essay* in opposition to William Godwin's advocacy of an egalitarian society and his view that poverty was caused by the maldistribution of society's wealth.

[54] Gough, 1936

[55] Atiyah, 1979, p285

[56] Murphy, John P, 1990, Pragmatism From Peirce to Davidson, Westview Press, Boulder, p17

[57] MacIntyre, Alaisdair, 1988, Whose Justice? Which Rationality? Duckworth, London

[58] MacIntyre, 1981, 1985, After Virtue, 2nd edition, Duckworth, London

[59] Murphy, John P, 1990, Westview Press, Boulder

[60] Rawls, John, 1971, A Theory of Justice, Bellknap Press, Cambridge, MA

[61] Rengger, N J, 1995, Political Theory, Modernity and Postmodernity, Blackwell, Oxford

[62] Gauthier, David, 1977, The Social Contract as Ideology, Philosophy and Public Affairs, Vol 6, Number 2, Winter, pp130-164

[63] Gauthier, 1977

[64] Gauthier, 1977, p152

[65] see Stephen K White, 1991, Political Theory and Postmodernism, Cambridge University Press, Cambridge, and N J Regger, 1995, Political Theory, Modernity and Postmodernity, Blackwell, and Doug Brown, 1991, An Institutionalist Look at Postmodernism, Journal of Economic Issues, Vol XXV, No 4, December

[66] Lyotard, Jean-Francois, 1984, The Postmodern Condition: A Report on Knowledge, University of Minnesota Press, Minneapolis

[67] Brown, 1991

[68] Reid, Duncan, 1993, So What's New with the New Paradigm? St Mark's Review, Summer, Canberra

[69] Reid, 1993, p10

[70] Reid, 1993, p9

[71] He reaches this position not on the basis of the tradition of discourse used here, but on the basis of a judgement, a synthesis of long experience, and a leap of faith, confirmed by subsequent experience.

[72] Nielbuhr, 1944, makes the same argument.

[73] Horwitz, Morton J, 1992, The Transformation of American Law, Oxford University Press, New York

[74] Phillips, 1986, p37

[75] Hume, David, 1978, A Treatise of Human Nature, Oxford, pp469-70

[76] Blaug, M, 1980, The Methodology of Economics, Cambridge University Press, Cambridge,

[77] Weber, Max, 1949, The Methodology of the Social Sciences, trans E A Shils and H A Finch, The Free Press

[78] Robbins, L, 1932, An Essay on the Nature and Significance of Economic Science, Macmillan, London

[79] Lipsey, Richard G and Colin Harbury, 1988, First Principles of Economics, Weidenfeld Paperbacks, London

[80] Senior, Nassau, 1965, An Outline of the Science of Political Economy, Augustus M Kelly, New York

[81] Bush 1991

[82] Macintyre, Alaisdair, 1981, 1985, After Virtue, 2nd ed, Duckworth, London

[83] Of course, it could be responded that this does not undermine Hume's logical point as the concept of a social role involves a hidden moral premise. This response, does not, however, deal with the practical implications of Macintyre's point. People are involved in social roles with socially defined moral responsibilities and to designate the role is also to designate the responsibilities.

[84] Bush, Dale Paul, 1991, Reflections on the Twenty-Fifth Anniversary of AFEE: Philosophical and Methodological Issues in Institutional Economics, Journal of Economic Issues, Vol XXV No 2 June

[85] Toulmin, Stephen, 1990, Cosmopolis, The Free Press, New York

[86] Phillips, 1986

[87] Boulding, 1970

[88] Myrdal, Gunnar, The Political Element in the Development of Economic Theory, preface to the English edition of 1953, cited Stark, W, The Sociology of Knowledge, Routledge and Kegan Paul, London, 1971, p66

[89] Haan, Norma, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, 1983, Social Science as Moral Inquiry, Columbia University Press, New York

[90] Rorty, Richard, 1980, Philosophy and the Mirror of Nature, Basil Blackwell, Oxford

[91] Rorty, 1980

[92] Toulimin, 1990

[93] Haan et al, 1983

[94] Haan et al, 1983

[95] Samuels, 1980,Economics as Science and its relation to Policy: The Example of Free Trade, Journal of Economic Issues 14, March

[96] Hausman, Daniel M and Michael S, McPherson, 1996, Economic Analysis and Moral Philosophy, Cambridge University Press, Cambridge

[97] Blaug, 1980

[98] Blaug, 1980

[99] Popper, K, 1959, The Logic of Scientific Discovery, Harper Torch-books, New York

[100] Kuhn, T S, 1970, The Structure of Scientific Revolutions, 2nd ed, University of Chicago Press, Chicago

[101] Rorty 1980

[102] Rorty 1980

[103] In the author's opinion, Blaug's account tends to exaggerate the extent to which Kuhn backed away from his earlier position.

[104] Phillips, 1986

[105] Rorty, 1980, p170

[106] Rorty, 1980

[107] Rorty, 1980

[108] Phillips, 1986

[109] Peirce, Charles S, 1934, Collected Papers, vol5, Harvard University Press, Cambridge, Mass.

[110] Mead, George Herbert, 1934, Mind, Self and Society, University of Chicago Press, Chicago

[111] Toulmin,1990

[112] Toulmin, 1990

[113] Toulmin, 1990

[114] Toulmin, 1990

[115] Toulmin 1990

[116] Toulmin 1990

[117] Lewis, C I, 1932, Alternative Systems of Logic, Monist, 42, October, p505

[118] see Ernst Nagel and James R Newman, 1959, Godel's Proof, Routhedge and Kegan Paul, London

[119] Purcell 1973

[120] Purcell 1973

[121] Purcell, Edward A Jr, 1973, The Crisis of Democratic Theory, The University of Kentucky, Lexington, p6

[122] MacIntyre, 1988

[123] Rorty, Richard, 1979, Philosophy and the Mirror of Nature, Princeton University Press, Princeton

[124] Hamilton, Garry G, 1994, Civilization and the Organization of Economics, in Handbook of Economic Sociology, Princeton University Press, Princeton

[125] This is too simple a view that is subject to challenge, but that challenge will not be taken up here. That challenge does not undermine Hamilton's fundamental point. The Eastern view does not lead to a belief

that everything is explainable by rational means or, indeed, to a drive for understanding of causes in that mode, but in a search for harmony with the origin of meaning, the Dao, the Way, that mystery which we call God.

[126] Rorty, 1979

[127] Rorty, 1979

[128] Rorty 1979

[129] Horwitz,1992

[130] Hamilton, 1994

[131] Paul Rabinow, Humanism as Nihilism: The Bracketing of Truth and Seriousness in American Cultural Anthropology, in Hann, et al, 1983

[132] Foucault, Michel, 1970, The Order of Things, Travistock Publications, London

[133] Toulmin 1992

[134] Toulmin 1990, p193

[135] Gilmore, 1995

[136] Horwitz 1972, pvi-pviii

[137] Purcell 1973

[138] Frowen, 1997

[139] Nielbuhr, 1944

[140] Waldrop, Mitchell, 1992, Complexity, Viking , London

[141] Blaug, 1980

[142] Klamer, A and Mc Closkey, D, Economics in the Human Conversation, in The Consequences of Economic Rhetoric, Cambridge University Press, Cambridge, 1988. See also Warren J Samuels, ed, 1990, Economics as Discourse, Kluser Academic Publishers, Boston and Don Lavoie, de, 1990, Economics and Hermeneutics, Routledge, London

[143] Klamer & Mc Closkey, 1988, p32

[144] Klamer & Mc Closkey, 1988, pp38-40

[145] Heilbroner, Robert, Economics as Ideology, in Samuels, 1990, p109

[146] Hoover, Kevin D, 1995, Why does Methodology Matter for Economics, The Economic Journal, 105, p715

[147] MacIntyre, 1981, 1985

[148] Gascoigne, Robert, 1994, Christian Faith and the Public Forum in a Pluralist Society, Colloquium 26/2

[149] Kennedy, Ian, 1981 The Unmasking of Medicine, G Allen and Unwin, London

[150] Gaita, R, 1991, Good and Evil: an Absolute Conception, Macmillan, London

[151] Habermas, Jurgen, 1998, On the Pragmatics of Communication, Mit Press, Cambridge, Mass

[152] Hausman and McPherson, 1996

[153] MacIntyre, 1966, A Short History of Ethics, Routhledge and Kegan Paul, London, p266

[154] Hausman & McPherson, 1996

[155] MacIntyre, 1981, 1985, pps 17-18

[156] Mac Intyre, , 1966 p49

[157] MacIntyre, 1981, 1985

[158] MacIntyre 1981, 1985

[159] MacIntyre 1966

[160] Rorty, Richard, Haan et al, 1983

[161] Haan et al, 1993

[162] Lacan, Jacques, 1991, Lacan and the subject of Language, ed Ellie Ragland-Sullivan and Mark Bracher, Routhedge, New York

[163] Haan et al, 1993 p238

# CHAPTER 5: THE DOCTRINE OF FREEDOM OF CONTRACT

> *Let us clear from the ground the metaphysical or general principles upon which, from time to time, laissez-faire has been founded. It is not true that individuals possess a prescriptive 'natural liberty' in their economic activities. There is no 'compact' conferring perpetual rights on those who Have or those who Acquire. The world is not so governed from above that private and social interests always coincide. It is not so managed here below that in practice they coincide. It is not a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interest. Nor is it true that self-interest generally is enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these. Experience does not show that individuals, when they make up a social unit, are always less clear-sighted than when they act separately.* J M Keynes[1]

## INTRODUCTION

The account now turns to an examination of the emergence of classical contract law towards the end of the nineteenth century and of its central doctrine, freedom of contract. That development of that doctrine was closely associated with the rise of the positivist views that have been so strongly criticised in the previous chapter. The doctrine is central to the Australian Fair Trading debate that will be discussed in the next chapter. It will be shown that the doctrine has its origins in the breakdown of medieval ideas regulating social and economic life and the emergence of social contract ideas as a basis for explaining social order and justifying the property rights of the elite. Natural Law, the Natural Lawyers, and the gradual secularising of that tradition also heavily influenced the growth of the doctrine. It is in the context of that doctrine, and its gradual erosion throughout this century, that the Australian Fair Trading debate occurred.

Contract, broadly defined, is one of the central techniques of the market system. And, as has been shown in Chapter 4, many philosophers and economists have used contract as their fundamental explanatory device in explaining or justifying social order. The doctrine of freedom of contract is therefore central to the conceptual framework within which economists, and, in particular, economic rationalists, operate.

Since the Australian common law tradition derives from England, it is necessary to look to the development of the law in England, particularly the law of contract, to develop an understanding of the Australian Fair Trading debate. As will be seen in the following section, that law was heavily influenced by the Enlightenment and by its natural law outlook. Indeed the rise of the doctrine of freedom of contract, one of the great intellectual movements of modern times, parallels the rise of capitalist society and its adherence to social contract theory.[2] As will be shown shortly, classical contract law reached its pinnacle in the late nineteenth century.[3] There are, of course close links between the development of the common law and the law of contracts in England and in the United States where English judgements and theorists continuing to exercise considerable influence.[4] Indeed, in the period between 1776 and 1784, eleven of the original States in the United States adopted some provisions for the reception of the common law as well as of a limited class of British statutes.

Chapter 4, in discussing the development of social contract theory, pointed to the gradual breakdown in the medieval idea that people owed a wide range of social and religious duties. In that world, relationships were largely customary, but law backed that custom. Indeed, law, custom, and morality were not clearly distinguished. While there were some elements of bargaining and free choice in economic life, that freedom was severely constrained by ethical ideas. These ideas ensured that economic relationships occurred in ways that were thought to be fair and just. Thus the notion of a just price and a just wage were central to medieval economic thought.[5] Custom and law imposed a duty on those exercising authority to enforce those just prices and wages. Any bargain in which one party obviously gained more advantage than the other and used his power to the full was regarded as usurious. No one doubted that everybody was entitled to subsistence. Thus there were repeated attempts to impose price controls

on staple items as well as to regulate wages. Indeed, until the end of the fifteenth century all lending at interest was, in theory, totally prohibited. Aquinas (1224-1274) had made a distinction between a wrongful trade that was carried on for profit and a rightful trade, which served public necessity.[6] A sale in which there was a defect in either quantity or quality was sinful and was void. Similarly, a seller was obliged to reveal a secret flaw in the product being sold. Consequently, the doctrine of *caveat emptor*, the companion doctrine to the doctrine of freedom of contracts, as understood in the mid-nineteenth century, was not part of the reputable ideas of the middle ages.[7]

In this medieval world, the possession of property involved temporary custodianship and carried duties as well as rights. Nor was government regarded as unnatural or a necessary evil. On the contrary, for Aquinas, leadership and rule would have been necessary in an earthly paradise as it was among angels.[8] The inclusion of avarice among the seven deadly sins brought the whole sphere of trade into ecclesiastical jurisdiction. But the same sense of control extended to the secular realm. The system of justice included the King's tribunals and local and special courts in which administrative and judicial functions were blended in ways that now seem curious. These functions included a wide range of regulations controlling trade and ensuring an open market, a fair price and good quality. These arrangements became even more formalised as market towns succeeded fairs. And as ecclesiastical authority broke down, the secular realm, particularly the crown, took a larger and larger role in the maintenance of these fair-trading regulations. The resulting litigation cannot be reduced to modern legal terms, but they were more in the nature of criminal rather than private actions. It was the community and the craft that were seen as being injured by breaches of these regulations more than the buyer.[9] Hamilton says of the regulation of trade in sixteenth century Southampton:

> "The picture which these mercantile entities as a whole impress upon the mind of the student is that of a semi-socialistic community in which every craftsman and every trader is to some extent a public official, working under license, enjoying monopoly, subject to supervision, regulated by authority, in matters of quality, quantity, and price of goods, hours of labour, number of apprentices and journeymen, and almost every other particular of his occupation."[10]

By the end of the sixteenth century, the common law shared the domain of justice with courts of custom, the liberties of the towns, and special tribunals. Thus the common law was not yet the common law. These attitudes were associated with view of the law as a body of essentially fixed doctrine derived from Divine and natural law and to be applied in order to achieve a fair result in particular cases between private litigants.[11] As a consequence, judges in England, and later in the American States, conceived of their role as merely discovering and applying pre-existing legal rules. This brought with it a strict conception of precedent in which judicial innovation was regarded as impermissible. At the same time, statute was largely conceived of as an expression of custom.

With the gradual breakdown of these ideas, the lords and freeholders came to question to some extent the legitimacy and privileges of the crown and of government more generally. They also began to see themselves as the owners of the land they occupied while at the same time ideas about the ownership of property become more 'absolute'. Similarly ideas about 'freedom' also became more absolute. The breakdown of central government during the Civil Wars (1642-51) also disorganised the system of market control, which had come to depend upon national authority.[12] The damaged authority of the central government never made a complete recovery even though the supervision of an expanding trade and commerce was maintained with decreasing effectiveness until well past the Restoration (1660).

As indicated in Chapter 4, these changes made it easier for the propertied elite to see civil society as based on a social contract, not on socially defined moral obligations backed by Divine Law.[13] Unlike the traditional natural law, natural rights theories were based on conflict between the individual and the state. As the basis of legal obligation was redefined in terms of popular sovereignty and contract, the natural law foundations of common law rules began to disintegrate.[14] By the eighteenth century, men thought of their relationships with each other, and the state, in contractual terms in which a key role was assigned to individual choice.

With this came a growing perception that judges did not merely discover law, but that they made it. Thus, they gradually began to feel free to disregard earlier precedent and to make law consistent with this prevailing contractual ideology. Regard for individual choice and contract played a central role in supporting a limited view of the role of the state and the erosion of the system of monopolies and of the legal regulation of trade. As we saw earlier, for both Hobbes and Locke the primary function of the state was the maintenance and enforcement of rights of property and of contract. Together with Adam Smith's *The Wealth of Nations*, and the associated idea of a harmony of interests, these theorists provided a moral justification for the property and contract based society of the eighteenth century

Roman law had a concept of promissory liability and this concept was reconstructed through the influence of Natural Lawyers such as Grotius (1583-1645) and Pufendorf (1632-94). Both argued for the 'naturally' binding nature of promises against the consideration-based theory of promissory obligation, which was still to be found in the common law of the sixteenth and seventeenth centuries. Indeed, Pufendorf was himself a major social contract theorist whose theories had a powerful influence especially in Germany.[15] The basic concepts and assumptions of Pufendorf's arguments are similar to those of Hobbes, but Pufendorf considered that in a state of nature there were natural laws including the obligation to keep promises. These natural law ideas, and Pufendorf's adjustments of Hobbes's assumptions, played an important part in Locke's social contract theory and in his defence of property.

There was a close connection between economic liberal ideas and the rule of law as it came to be understood after 1688. The idea that the law should be regular, certain, and subject to interpretation by independent judges has a powerful value content, the value of individual freedom and free choice. The rule of law is, itself, a politically biased ideology because by promoting procedural justice it enables the shrewd, the calculating and the wealthy to manipulate its forms to their advantage.[16] Sir Edward Coke (1552-1634) was one of the precursors of legal liberalism in the common law tradition:

> "Coke's legal decisions in the field of economic regulation do constitute a radical break with the past and do lay some legal foundation for what later amounts to modern rational capitalism."[17]

English common law gained its supremacy over the prerogatives of the crown largely through Coke's efforts.[18] Cork was opposed to what he saw as the usurping of power by the King, and appealed to the common law as a traditional barrier to the interference by government with the economic and other freedoms of the individual.[19] In the process Coke distorted and misinterpreted the past common-law tradition to make it seem more strongly favourable to economic liberalism than it was in fact. Thus while the doctrine of *caveat emptor* had no ancient lineage, it was Coke who helped establish it by setting it down in his treatises on law.[20] Lord Mansfield, Chief Justice of the King's bench from 1756 to 1788, was another major figure, who was also an economic liberal, who did much to consolidate and develop commercial law. It was during Mansfield's tenure that the overthrowing of the traditional role of the courts in regulating the equity of agreements began in earnest in England. A casual aside by Lord Mansfield, that the only basis for an action for a breach of warranty was an express contract, laid the basis for the adoption by the courts of the doctrine of *caveat emptor* and the rapid overthrow of an important element of the equitable conception of contract.[21]

Mansfield's conception of a general jurisdiction of commercial law, emphasising its universal character and its correspondence with natural reason, had an overwhelming influence in the United States. This involved a new stress on the functionality and rationality of the legal rules free from every local peculiarity, and brought with it a growing distinction between morality and the law. Horwitz[22] in particular notes the influence of a new utilitarianism in nineteenth century US law in general and in the erosion of concern for the fairness of contracts in that country. What was involved was a change in the moral conception underlying contract in which the express contract became paramount. But Horwitz also notes the influence of a new alliance between the mercantile classes and the legal profession, firstly in trying to subvert the influence of Equity and juries on commercial cases, and ultimately in moulding legal doctrine to accommodate commercial interests.

This growth in commercial law also reflected the increasing complexity of economic transactions. Indeed, the common law had managed very well for some centuries before anybody realised that there was a law of contracts.[23] But once its existence had been realised it was impossible for lawyers to do without it. Thus the title theory of exchange ceased to be an adequate description of economic transactions. The wholly executory contract, in which the contract is made prior to its performance, came to be seen as the paradigm case, a case in which contract is understood as creating an expected return not as a transfer of a title. Consequently, the focus of contract law altered from the performance of the obligations to the making of the contract. This change helped break the link between contractual obligations and the justice of the consideration. This is the paradigm case to which economists refer in describing contracts as a risk allocation mechanism.

As the law moved increasingly to a recognition of the generality of the binding nature of contracts, they began to be seen as being about promises, wills and intentions and not about particular relationships and particular transactions. While there had never been an overt principle of fairness in the common law of contracts, lawyers of the seventeenth and eighteenth centuries were not indifferent to such concerns. For example, Lord Hardwicke said in 1748 that every contract with a sailor must be fair.[24] While generally the inadequacy of a consideration may not have provided adequate grounds for setting aside a contract, gross inadequacy did. And inadequacy supplemented by a very wide range of other matters also sufficed. Indeed, there were signs of a broad principle of good faith emerging in the common law of contracts in the late eighteenth century, a development that ultimately came to naught. Jury control over damages may have rendered it unnecessary to strive for substantive fairness of exchange. For Atiyah, it was the jury that bridged the gap between morality and the law.[25] In any event grossly unfair contracts were liable to be upset in Chancery, and it was in Chancery that the greater part of contract litigation took place.

Chancery was the second of two different traditions in English legal practice. Equity consisted originally in a body of rules and procedures that grew up separately from the

Common Law and which were administered in different Courts. From the time of Edward II, or earlier, the Chancellor and his officials, later the Court of Chancery, as 'keeper of the King's conscience' could give equitable relief where the common law courts might provide no remedy. They exercised a jurisdiction that did not override the Common Law but remedied its imperfections. With the rationalisation of legal practice, the Common Law and Equity are now merged and administered by a single set of Courts almost everywhere. Indeed, while the merger of Law and Equity is usually portrayed as a rationalisation of civil procedure, for Horwitz it represents the final and complete emasculation of Equity as an independent source of legal standards.[26]

While the moral ideas of economic liberalism were gaining adherence in the common law tradition, and society more generally, the Chancery tradition (Equity) maintained the older tradition of regulation, protection and paternalism. It was a tradition that was only gradually eclipsed as the doctrine of freedom of contract gained hold; but it was a tradition that was never completely abandoned. Thus, as late as 1829, Best CJ ruled that

> "It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and make it the interest of manufacturers and those who sell, to furnish the best article than can be supplied."[27]

Similarly in the United States in 1817, Chancellor Desaussure of South Carolina had this to say:

> "[I]t would be a great mischief to the community, and a reproach to the justice of the country, if contracts of very great inequality, obtained by fraud, or surprise, or the skilful management of intelligent men, from weakness, or inexperience, or necessity could not be examined into, and set aside."[28]

Indeed, in the United States, the role of the jury ensured that the community's sense of fairness was often the dominant standard in contract cases.[29] With the eclipsing of this equity tradition in both England and the United States, the discretionary application of equity as a form of mercy also declined. And with this decline in concern for fairness

came a parallel decline in concern in the law of contract with duress and with mistake. At the same time, the role of juries in determining the law and contractual damages was gradually whittled away first in England and later in the United States.[30]

It is clear that this emerging eighteenth and nineteenth century notion of contract, and the role it plays in society, was far broader than is held generally today. The rationalisation of the common law was particularly influenced by a new legal literature looking for legal principles based on rational first principles, and influenced by French legal ideas. For example, Powell's Essay Upon the Law of Contracts and Agreements, the first English thesis on contract published in 1790, saw the equitable conception of substantive justice as undermining the rule of law:

> "[I]t is absolutely necessary for the advantage of the public at large that the rights of the subject should . . . depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied . . . must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the judge."[31]

Interestingly, Horwitz[32] documents the influence of Powell's essay on the erosion of concern with the substantive justice of contracts in the United States. Similarly for Addison in 1847:

> "The law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deducted from natural reason which are immutable and eternal."[33]

It is also clear from Powell that that the emergence of a market economy and its associated economic ideas played an important role in this view;

> "[I]t is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value . . ."[34]

Where there is no intrinsic measure of value of a good or service, but only their subjective value to the particular parties, there can be no substantive measure of exploitation. Indeed, there was a particularly close relationship between law, economics and the social sciences in the first forty years of the nineteenth century.

The economic ideas, which influenced lawyers and judges and the development of the common law, were the ideas of the classical economists between 1776 and 1870. While they assumed that the law must provide for the enforcement of contract, they gave no real thought to why the enforcement of contracts was not, itself, a form of government intervention.[35] Nevertheless, the concept of freedom of contract was at the very heart of classical economics and was taken over by the common lawyers of the early part of the nineteenth century. Indeed, *The Wealth of Nations* published in 1776 had a major impact on political thought about economic matters. Politicians relied upon Smith's ideas and he was consulted by leading Ministers. For example, Pitt the Younger was heavily influenced by *The Wealth of Nations*, paying tribute to Smith in Parliament on several occasions.[36] As a result of this influence, in 1795 Pitt withdrew proposals for regulating wages and giving family allowances. Similarly, it was Bentham's *Defence of Usury* of 1796 that provided the intellectual foundations for later efforts to repeal usury laws in both England and the United States.[37] By the end of the century the classical economic literature was well known to the educated public and was influential in policy making generally. In turn, Malthus and Ricardo exercised considerable influence. Not only did Ricardo believe that all contracts should be left to the freedom of the market but that the law needed to facilitate exchange:

> "Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature."[38]

Ricardo also opposed the Usury Laws in 1818 and the renewal of the Truck Act in 1822. In turn, Nassau Senior was an adviser to Whig politicians in the 1830s and 1840s.[39] Influenced by these advisers Lord Melbourne, Prime Minister for seven years in the 1830, believed that

> "the whole duty of government is to prevent crime and to preserve contract."[40]

Similarly, in the United States, usury laws were attacked on the grounds that they were a violation of the best principles of both politics and political economy.[41]

Associated with this rise of freedom of contract was the idea of *caveat emptor*, whereby responsibility for determining the quality of goods being purchased rested firmly on the

purchaser. In his Principles of Political Economy, published in 1864, J R McCulloch expressed this principle as follows:

> "It is perhaps hardly necessary to advert to the regulations intended to secure the quality of manufactured goods that were formerly so general. These are now almost everywhere abolished; and it appears to be universally conceded that in this, as in most other things, the free competition of the producers is the only principle on which reliance can ordinarily be placed for securing superiority of fabric as well as cheapness. Wherever industry is emancipated from all sorts of restraints, those who carry it on endeavour, by lessening the cost, or improving the fabric of their goods, or both, to extend their business; and the intercourse that subsists among the different classes of society is so very intimate that an individual who should attempt to undersell his neighbours by substituting a showy and flimsy for a substantial article, would be very soon exposed, and be obliged to reduce its price to its proper level."[42]

In addition to the direct influence of major classical economists, in the early decades of the nineteenth century popularisers, like James Wilson, the editor of *The Economist*, and Harriet Martineau, began to propagate very simplistic versions of political economy, fixing in the popular mind that *laissez-faire* was the practical conclusion of orthodox political economy.[43] Indeed, the doctrine even got hold of the educational system.[44] While *laissez-faire* was not a coherent political philosophy, it is a convenient way of summing up the orientation towards public affairs that was typical of the nineteenth century. Indeed, for Keynes, the survival of the fittest could be regarded as a vast generalisation of Ricardian economics.[45] One of the strongest advocates of *laissez-faire* and freedom of contract was Herbert Spencer (1829-1903) who saw the very close similarity between *laissez-faire* and Darwinism. In his *Social Statics*, Spencer idealised freedom of contract as the supreme mechanism for maintaining the social order with the minimum of coercion. Of course, Spencer's views were quite extreme, objecting, inter alia, to State-aided education, sanitary and public health laws and the licensing of doctors.

Laissez-faire principles may well have had more influence on judges, and judge-made law, than on the other organs of the English state. Judges and lawyers tended to be very conservative, considering the common law as the repository of principle, and Statute law as exceptions lacking any coherent social philosophy. Atiyah makes much of this emphasis on principle in Victorian life and on its tendency to become more absolute.[46] The rise of formalism in the law, particularly in the United States, played a role in this attitude. This formalism, the attempt to place the law under the rubric of 'science', was a belief that all law is based on abstract legal doctrines and principles, which can be deduced from precedents and that that there is only one correct way of deciding a case. The aspiration was to create formal general theories that would provide uniformity, certainty and predicability in legal arrangements and which would distinguish sharply between law and morals.[47]

This new formalism served to reinforce the recently developed law of contract by giving the impression that the principles of that law of contracts were inexorable deductions drawn from neutral principles. Within this framework, it was the market that supplied the so-called neutral principles, free from all political influence. This attempt to separate law from politics has been a central aspiration of the American legal profession.[48] It served the interests of the legal profession to represent the law as an objective, neutral, apolitical and scientific system. This encouraged a search for fixed principles that would govern a large number of cases without too close an inquiry into the facts. As a consequence, everything not fitting the pattern of the free market was simply defined as being outside the law of contract, as some other exceptional body of rules – company law, factory legislation, building laws, sanitary laws etc. Such statutes were excluded from the emerging conceptual scheme of a general law of contract based on free market principles, the classical theory of contract. Nevertheless, Atiyah cautions that legal writers in commenting on the influence of *caveat emptor* and *laissez-faire* attributed a much greater significance to particular legal cases than was warranted by the practice of the courts more generally. Indeed, Gilmore ridicules the conclusions drawn by judges and treatise writers from some of the particularly significant cases.[49] Nevertheless, the effect of these changes in values was to reshape the legal system to the benefit of business and to the detriment of other less powerful groups. The selection of

'leading cases' and the dismissal of the 'anomalous' was clearly influenced by the ideological commitments of the systems-builders.

The nineteenth century, the very heyday of sanctity of contract and of laissez-faire, was, nevertheless, the period in which a whole machinery of Government was created in Britain virtually out of nothing. Thus, while there was widespread support for free market principles, in practice the role of government and of government regulation expanded greatly. Atiyah comments that one of the main reasons that had inhibited such government regulation was ignorance of the social evils associated with rapid population growth, industrialisation and urbanisation, and of how to deal with them.[50] The growth of a professional bureaucracy, and the activities of Royal Commissioners and Parliamentary Select Committees, corrected this ignorance and led to much legislative and regulatory activity. Overwhelming majorities in both Houses of Parliament passed much of this social legislation. Many of the participants who started as disciples of Adam Smith and Ricardo, and firm believers in individualism and self-reliance, were converted by their inquiries into zealous public servants demanding more legislation, better enforcement and more administrative staff.

This enormous change in the character and quantity of legislation had a profound impact on the very idea of a contract-based society. With the growth in increasingly sophisticated legislative activity, the courts abandoned the overt exercise of law making activity and the role of the superior courts as the principle organs of law-enforcement began to decline. Thus, for Atiyah, by 1870 individualism as a social mechanism had very largely broken down and had been replaced by a different order of society in which control, regulation, licensing, and institutional arrangements had become the dominant mode of social organisation. Nevertheless, 1870 can be regarded as the high point of the doctrine of freedom of contract within the English courts:

> "If there is one thing which more than another public policy requires, it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this

> paramount public policy to consider in that you are not lightly to interfere with this freedom of contract."[51]

The language chosen provides a clear example of the worship of technique to which Ellul[52] refers.

Atiyah qualifies his account of the dominance of the doctrine of freedom of contract by suggesting that English judges have always been stronger in doing justice in a pragmatic fashion than in providing theoretical justifications for their decisions. In addition, the weight of earlier tradition was influential in particular cases. Laissez-faire views, and the doctrine of freedom of contract, had a much greater influence on contract law in the United States than in England. Gilmore attributes this to the influence of what he calls 'the great systems-builders' seeking to develop self-contained and logically consistent systems of rules and doctrines, but it was a systems-building that drew on Bentham's example.[53] Gilmore also speculates that the Puritan ethic was somehow involved, noting the moral fervour with which judges insisted on the performance of contractual obligations. For Horwitz,[54] nineteenth century US judges professed a contractarian ideology that was instrumental in promoting economic development and *laissez-faire* in being hostile to legislative or administrative regulation. Moreover, the idea of property as a pre-political Lockean natural right, not created by law, remained at the centre of American legal thought.[55] Murphy confirms this influence[56] in the following terms:

> "Spencer's influence on American thought in the second half of the nineteenth century was particularly strong. He formulated his laissez-faire philosophy in such a way that it appealed 'at once to the traditional individualism and the acquisitive instincts of Americans, who were able without too great inconsistency to regard whatever they did, individually, as in harmony with evolution and whatever government or society did, collectively, as contrary to natural law.'"

Thus the US Supreme Court in 1905[57] elevated the principle of freedom of contract to the level of a sacred constitutional principle. But in common law in England the tide was about to turn. Even in the United States, the dominance of the doctrine of freedom of contract was short-lived. The US Supreme Court decision of 1905 provoked a

Progressive reaction and fundamental attacks on this form of legal thought. And with these attacks came a breakdown in these absolute concepts of property and of contract.

In England, the idea of *caveat emptor* did not long survive the growth in consumption of manufactured goods and the reality that people did rely on their suppliers when it came to the quality of the goods they supplied. For example, in Piggott v Stratton in 1859 Lord Cambell and the Lords Justice of Appeal ruled that:

> "the business of life could not be conducted if it were required that men should anticipate and expressly guard against the wily devices to which the deceitful may resort."[58]

Thus, from the 1860s onwards, the English courts started to limit the application of the principle of *caveat emptor*. Decisions in *British Columbia Saw Mill Co Ltd v Nettleship* (1868) and *Horne v Midland Rly Co* (1873) were major departures from the assumption that the parties must have contracted on the basis of the information available to them, the first since the rise of the doctrine of freedom of contract. Consequently, some inquiry by the Courts into the facts was needed from this date onwards. In 1884, in *Foakes v Beer*, the House of Lords started to move back towards the idea of fairness in an exchange and away from the idea that a bare agreement was always binding.

At the same time, the ideal of freedom of contract was itself subject to increasing political challenge, particularly with the expansion in the franchise. This involved a significant shift in political thinking, a shift that occurred in both England and the United States. For example, in the 1880s George Bernard Shaw opposed the appeal to free contract, free competition, free trade and laissez-faire against the regulatory activities of the state."[59]

Similarly, the philosopher T H Green set out to challenge the primacy of freedom of contract in his *Liberal Legislation and Freedom of Contract:*

> "To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from

> the helplessness of one of the parties to them, instead of being a security for freedom becomes an instrument of disguised oppression."[60]

Joseph Chamberlain in 1885 also criticised the faith that been place in freedom of contract had for the best part of the nineteenth century:

> "The great problem of our civilisation is still unresolved. We have to account for and to grapple with the mass of misery and destitution in our midst, co-existent as it is with the evidence of abundant wealth and teeming prosperity. It is a problem which some men would set aside by reference to the eternal laws of supply and demand, to the necessity of freedom of contract, and to the sanctity of every private right of property. But gentlemen, these phrases are the convenient cant of selfish wealth."[61]

And increasingly the common law and legislation interfered with that freedom of contract and with the principle of *caveat emptor*. The effect was to narrow significantly the field of activity over which freedom of contract and contract law held sway. This change is perhaps most clearly marked by the passage in 1893 of the Sale of Goods Act, dealing with such matters as title, quiet possession, freedom from encumbrances, correspondence with description, merchantable quality, fitness for purpose and sales by sample. This legislation was adopted virtually unchanged by every Australian State and Territory.[62]

Thus it is clear that the idea of freedom of contract as an absolute ideal gained credibility and influence in the nineteenth century but was eclipsed by the end of the century as the practical consequences of reliance on this principle began to be realised and to offend the sense of justice of the bulk of the population.

Surely it is now clear that property and contract are not natural 'rights' but social and legal artefacts or, even, 'techniques'. Atiyah argues that there is much about the modern world that suggests an affinity with some of the older traditions and suggests that, at least in England, the law is returning to those traditions. This is a theme that arose in Chapter 4 with Toulmin's suggestion that there is a need to return to the humanism characterised of Erasmas away from the dogmatism of the Enlightenment.[63]

## THE DOCTRINE OF FREEDOM OF CONTRACT

As indicated above, the doctrine of freedom of contract was the central doctrine of the classical contract law that came to full development in the last half of the nineteenth century. Indeed, the very idea of a general law of contract is part and parcel of the same positivist era. This law was the creation of judges and thesis writers influenced by social contract ideas dating back to Locke, by classical economic thought, and the associated ideology of voluntariness. Among legal theorists of the late nineteenth century the law of contract was the archetypical branch of what was conceived of as legal 'science'. This involved an attempt to systematise the various doctrines and decisions of the courts to do with contract issues into a consistent and logical theory in which the legal rules were to be deduced from general concepts like property.

The classical view of contract involved a process of abstraction, generalisation and systemisation in an attempt to create a unitary theory that was thought to be free of moral valuations and thus could appropriately be described as a science. This development formed part of the more general attempt to substitute scientific discourse for moral discourse at a time when the traditional religious underpinning of moral values were coming under increasing attack with the decline in formal traditional religious belief. Thus there was an attempt to distinguish between what was conceived of as public law and contract or private law, law which individuals legislated for themselves. Indeed, the distinction between public and private law was part of the Enlightenment's attempt to separate the public from the private realm attempt in political and legal theory. Central to this conception of contract was the idea that contract obligations arose from the wills of the individuals concerned, and not as a result of a socially and historically constructed legal institution. Thus it has much in common with the Lockean idea of property as a pre-social natural right. Indeed, the obligation to fulfil promises, central to classical contract law, was at its heart a Lockean Natural Law, but a natural law increasingly bereft of its metaphysical foundations.

In retrospect, this development can be seen as a process of reification, a manifestation of an excessively legalistic mentality in which legal rules and universal abstractions acquired sanctified status and became absolutes. What was also involved was an

attempt to claim that the rule of law provided norms independently of politics. There is a close connection between this ideal of a rule of law and not of men and laissez-faire ideas. Thus it was assumed that rules fixed and known beforehand would make it possible for economic actors to foresee how the courts would use their coercive powers and thus would allow those economic actors to plan their activities effectively. Hayek made much of these ideas in his defence of the market system.[54] They involve an underlying assumption that predicability is associated with generality. It is also a view that conceives of courts as enforcers of rules rather than as settlers of disputes. This is also a view that conceives of judges as rulers on the truth, a view that encourages the adversarial approach of common law courts. From this rule-based point of view, any movement away from the strict enforcement of rules towards multi-dimensional standards like fairness is to be deplored. Herein lies the source of the conflict between equity as it had been developed in earlier times and classical contract law. The nineteenth century desire for uniformity, certainty and predicability could not be reconciled with the discretionary element implicit in equity. Herein also lies the source of the reluctance to inquire too closely into the particularities of the subject matter of an agreement, the circumstances of its making, the actual expectations of the parties and especially of the outcomes realised. In practice what came to be important in contracts was the written document as interpreted by the courts in a highly literalist manner, independent of any substantive inquiry of the parties (the parole evidence rule precluded such inquiry into the circumstances surrounding written contracts). All of this involved a commitment to a rigid and mechanical decision rule, to be implemented in a mechanical manner, a replica of the determinism of Newtonian physics.

This view of contract law has increasingly founded on the evidence of experience. Too rigid an enforcement of contracts on the basis of freedom of contract led to what were clearly recognised as unjust outcomes. These were not tolerated by legislatures and, over time, by the courts themselves. As a matter of practical politics, legislatures everywhere moved to legislate and to regulate to remove the grosser abuses of the contract system. These measures have not been confined to simply addressing issues associated with contract formation but have increasingly been concerned with the substantive outcomes of contractual arrangements. Thus, contract law came to be

systematically robbed by legislatures of much of its subject matter. As a consequence, pure contract law has ceased to occupy so central a position in the economic system.

Among legal theorists it was increasingly recognised that the refusal to inquire into the circumstances surrounding a contract was obviously inconsistent with the will theory on which classical contract theory rested.[65] This in turn lead to the replacement of the will theory with the development of the objective theory of contract, a theory which openly acknowledged that contracts were enforced for reasons of public policy. Thus it come to be recognised, particularly in the work of the theorists of the American Realist school, that classical contract theory was neither neutral or natural but was instead a historically contingent social and legal construct.[66]

Indeed the very idea of contract law as a neutral system has had to be abandoned. Rather, all valuations at law are moral choices. Contract law, and decisions in particular cases, involves a balancing of conflicting social values, not a deduction from consistent scientific principles. This realisation has posed an overwhelming challenge to deductive legal reasoning, as it is impossible to reason down from very general principles to particular decision. Indeed, this viewpoint leads directly to a good deal of scepticism about the applicability of general rules of the kind that Hayek advocated.[67] It also became clear that classical contract law conferred a privileged position on the status quo, the intelligent and the powerful.

Even the ideology of voluntariness has come under attack. The first point to be made in this regard is that methodological individualism in economic and moral theorising does not necessarily lead to any justification for a policy of self-reliance, however much the two are confused in practice. Secondly, it is transparently obvious that individuals are frequently not the best judges of their own interests. In any event, individual interests are often subordinated to social and political goals including in the law of contracts. It has also been pointed out that markets are to some extent coercive. Consequently, the problem is to decide what forms of coercion are to be regarded as legitimate.

The ideology of voluntariness has been seen to provide the more powerful party to a contract, a freedom of manipulation and motivation, a freedom from any onus of articulation, and a freedom from any other legal duties that cannot be fitted under the rubric of contract as promise.[68] Consequently, there has been a growing reluctance to concede to big business the right to dictate contract terms to less powerful parties, particularly consumers, through standard form contracts. Equally, there is a problem of deciding to what extent deception and concealment of information in contractual negotiations is also to be regarded as legitimate.

More generally, having acknowledged that contracts are enforced for reasons of public policy, and that they involve a balancing of conflicting value choices, the primacy of a policy that contracts should always be enforced is open to question. And, indeed, that is what has happened both as a result of legislative action and also as a consequence of judicial enlargement of various equitable doctrines. Adding to the confusion has been the realisation that the grounds for equitable intervention in the enforcement of contracts cannot be fitted under a unified doctrine or theory.

All of these influences have lead to a period of confusion in contract theory. Here in Australia there has been a growing acceptance of the objective theory of contract at the very time that theorists in the United States detect a process of doctrinal disintegration as it is increasingly perceived that contract law, as modified by the various equitable doctrines, involves a complex of diffused principles.[69] Even the idea of, and a need for, a general law of contracts as a uniform body of rules has been questioned.[70]

Some theorists like Gilmore predict the death of contract and its collapse into the law of torts.[71] While it might be going too far to suggest that a uniform law of civil obligations might emerge, there is certainly an increasing recognition of an obligation of good faith and a development in the direction of a duty of care in contractual arrangements. The former is not as radical as some of its opponents might like to suggest as the German civil code has had such an obligation for a century and a doctrine of good faith is now firmly entrenched in the US Uniform Commercial Code and in their Restatement of Contract. More generally, contract theorists like Atiyah[72] and Macneil[73] have

questioned whether contracts should be seen as a legal mechanism for establishing long-term business relationships, rather than the risk allocation mechanisms that economists have conceived them to be. This point of view emphasises the relational element involved in any commercial arrangement that is not a simple one-off exchange transaction. Atiyah,[74] for example, sees contractual obligations arising primarily from the reliance one party places in another, while Macneil stresses the fact that all longer-term contracts are incomplete as it is simply not possible, in practice, to anticipate all the possible eventualities and risks involved in an on going commercial relationship. Macneil sees the solution to this incompleteness as involving the development of intermediate contract norms to govern the ongoing relationship. This is consistent with empirical evidence of actual commercial behaviour particularly between large companies where the existence of a valued long-term relationship induces companies to resolve difficulties that occur in the relationship without reference to the written agreements between them, and without reference to the courts.

This chapter has surveyed the growth of the doctrine of freedom of contract and of classical contract law which reached full development in the late nineteenth century. That doctrine, and that law, is closely related to the tradition of political and moral thought that followed from Locke, and the Natural Law Outlook, described in Chapter 4. It was a view that was based on individualistic premises and natural law, both of which are open to damaging attack. It is a doctrine that has been in decline throughout this century, though some of that decline has been masked by the tendency to define statutory dilutions of the doctrine as erecting special rules outside of contract.

However, the Australian Fair Trading debate to which the account now turns openly challenged the doctrine as it involved proposals to directly legislate a prohibition of unfair conduct in contractual arrangements.

## Notes

[1] Keynes, J M, 1926, The End of Laissez-faire, The Hogarth Press, London p39

[2] Atiyah, P S, 1979, The Rise and Fall of Freedom of Contract, Clarendon Press, Oxford

[3] Horwitz, Morton J, 1974, The Historical Foundations of Modern Contract Law, Harvard Law Review, Vol 87, No 5, March, pp 918-956

[4] Horwitz, Morton J, 1977, The Transformation of American Law, Harvard University Press, Cambridge

[5] Tawney, 1972, R H, Religion and the Rise of Capitalism, Harmondsworth, p157

[6] Hamilton, Walton H, 1931, The Ancient Maxim Caveat Emptor, Yale Law Journal, l XL, No 8, June pp1133-1187

[7] Hamilton, 1931

[8] Viner, Jacob, 1978, Religious Thought and Economic Society, Jacques Melitz and Donald Winch eds, Duck University Press, Durham, NC

[9] Hamilton, 1931

[10] Hamilton, 1931, fn, pp1156- 1157

[11] Horwitz, 1977. Horwitz's comment is applied to eighteenth century America but the context makes it clear that it applies with equal force to England in an earlier period

[12] Hamilton, 1931

[13] The relationship between the rulers and the ruled, and between the people themselves, have both been treated under the general heading of the social contract.

[14] Horwitz, 1977

[15] Lessnoff, 1986

[16] Horwitz, Morton J, 1977, Yale Law Journal, 86, pp561-564,,

[17] Little, David, 1970, Religion, Order and Law, Basil Blackwell, Oxford, p244

[18] Encyclopaedia Britannica, 15th edition, 1981, Vol 4 p825

[19] Viner, 1960

[20] Hamilton, 1931

[21] Horwitz, 1977

[22] Horwitz, 1977

[23] Gilmore, Grant, 1995, 1974, The Death of Contract, Ohio State University Press, Columbus

[24] Atiyah, 1979 p172

[25] Atiyah, 1979

[26] Horwitz, Morton J, 1977, The Transformation of American law, 1780-1860, Harvard University Press, Cambridge

[27] Atiyah, 1979, p474

[28] Horwitz, 1974, p923

[29] Horwitz, 1974

[30] Gilmore, Grant, 1974, 1995

[31] Horwitz, 1974, p918

[32] Horwitz, 1977

[33] Addison in his Treatise of 1847, cited Atiyah, 1979, p400

[34] Horwitz, 1974, p918

[35] Atiyah, 1979

[36] Atiyah, 1979, p506

[37] Horwitz, 1977

[38] Atiyah, 1979, p314

[39] John Stuart Mill was the only classical economist to point out that the enforcement of contracts was itself a form of Government activity and that this necessarily imposed on the State a duty to determine which contracts should be enforced: *"Every question which can possibly arise as to the policy of contracts, and of the relations which they establish among human beings, is a question for the legislator; and one which he cannot escape from considering, and in some way or other deciding."* John Stuart Mill, Principles of Political Economy, Book V, Chapter 1, Sec 2

[40] Atiyah, 1979, p508

[41] Horwitz, 1977, pp243-244

[42] McCulloch, 1830, Principles of Political Economy, 2th edn, 1864, Longman Rees, Orme, brown and Green, London, p215

[43] Keynes, 1926 and Atiyah, 1979

[44] Keynes, 1926

[45] Keynes, 1926

[46] Atiyah, 1979

[47] Horwith, 1992

[48] Horwitz, 1977

[49] Gilmore, 1974

[50] Atiyah, 1979

[51] Jessel, M R in *Printing and Numerical Co v Simpson* (1975) cited Atiyah, 1979, p387. A further example cited by Atiyah1979 suggests that Jessel's views may even have been extreme for the times.

[52] Ellul, Jarques, 1965, The Technological Society, John Wilkinson trans, Jonanthan Cape, London

[53] Gilmore, 1974

[54] Horwitz, 1977

[55] Horwitz, 1992

[56] Murphy, John P, 1990, Pragmatism from Pierce to Davidson, Westview Press, Boulder

[57] Horwitz, 1992, citing *Lochner v New York*

[58] Atiyah, 1979, p478

[59] Atiyah, 1979.

[60] Atiyah, 1979, p585

[61] Atiyah, 1979, p587

[62] Taperell, GQ, Rb Vermeesch and D J Harland, 1978, Trade Practices and Consumer Protection, 2nd edn, Butterworths, Sydney

[63] Toulmin, 1990

[64] Hayek, F A, 1973, Law, Legislation and Liberty, Volume 1, Rules and Order, Chicago University Press, Chicago

[65] Horwitz, 1972

[66] Horwitz, 1972

[67] Hayek, 1973

[68] Lucke, H K, Good faith and Contractual Performance, 1987, in P D Finn, ed, Essays on Contract, The Law Book Company, North Ryde, pp173-175

[69] see Mason, AM and S J Gageler, in Finn 1987 and Horwitz, 1992

[70] Atiyah, P S, 1986, Essays on Contract, Clarendon Press, Oxford

[71] Gilmore, 1974

[72] Atiyah, 1986

[73] Macneil, Ian R, 1980, The New Social Contract, Yale University Press, New Haven

[74] Atiyah, 1986

# CHAPTER 6: THE FAIR TRADING DEBATE IN AUSTRALIA

> *Few who consider dispassionately the facts of social history will be disposed to deny that the exploitation of the weak by the powerful, organised for purposes of economic gain, buttressed by imposing systems of law, and screened by decorous draperies of virtuous sentiment and resounding rhetoric, has been a permanent feature in the life of most communities that the world has yet seen.*
> R H Tawney[1]

> *Will you be any friend to the court of wickedness: that contrives evil by means of law?* Psalm 94 v 20

## INTRODUCTION

This Chapter examines the Australian Fair Trading debate in the light of the conceptual discussions of the previous chapters, particularly on the doctrine of freedom of contract discussed in Chapter 5. It is not necessary for that purpose to continue with an exploration of decline of the doctrine of freedom of contract in England and in the United States and the gradual re-emergence of a concern with the fairness of contracts.

The Australian Fair Trading debate, as discussed here, occurred in the period 1974 to 1997. It revolved around proposals aimed at broadening, by statute, the Equitable doctrine of unconscionability, the doctrine that carried the remnant of the medieval concern for fairness in trade and contracts, and which permitted courts to decline to enforce contractual arrangements. As it had emerged, in effect, as part of classical contract law, that equitable doctrine was restricted to tightly defined procedural issues. Consequently, the proposal at the heart of the Fair Trading debate directly challenged classical contract law and the doctrine of freedom of contract.

Lack of time and space forbids dealing with the movement away from the doctrine of freedom of contract in the Australian States through detailed legislation covering such matters as weights and measures, sale of goods, safety and labelling requirements, or of hire-purchase legislation. In particular, attention will not be directed at the NSW

*Contract Review Act 1980*, which authorised NSW's courts to rewrite unfair contracts or to refuse to enforce them. Rather, attention will be directed to Commonwealth legislation intended to apply broadly to all trade and commerce. Nor will a detailed account be given of the constitutional limitations that confine the application of that legislation. Briefly, however, the constitution limits the Commonwealth's powers to make laws to specific heads of powers. The current Commonwealth *Trade Practices Act 1974* relies primarily on the power of the Commonwealth to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth, though it also relies upon the trade and commerce, and the postal and telecommunications powers. This means that the Act applies to individuals where the transaction involves inter-state or overseas trade or commerce or postal or telecommunications services. The States and Territories have all enacted complementary legislation.

The *Trade Practices Act 1974* deals with a wide range of business misconduct coming under the heading of 'unfair' besides unconscionable conduct in commercial transactions. These include the misuse of market power, unconscionable conduct in consumer transactions, and misleading or deceptive conduct. Consequently, proposals for legislative action by the Commonwealth to deal with unfair business conduct have usually involved proposed amendments to that Act. It is appropriate, therefore, to start this aspect of this inquiry by looking at the background to that legislation.

The first Commonwealth trade practices legislation was *the Australian Industries Preservation Act 1906.* As the Constitution does not give the Commonwealth an express head of power relating to restrictive trade practices, this Act relied for the most part upon the trade and commerce power (section 51(I)) and the corporations power (section 51(XX)). The Act was intended to repress agreements in restraint of trade and to prevent the injuring of Australian industry through unfair competition, mainly what we now call dumping.[2] This legislation had a significant protectionist flavour. The responsible Minister was particularly concerned that predatory conduct by overseas cartels should not undermine manufacturing industry in Australia and lead to monopoly rents on imported manufactures. The protectionist flavour was not unchallenged in the parliamentary debate.[3]

The Act was partly inspired the American antitrust laws. Indeed, Clause 4, and Clause 7 derive from sections 1 and 2 of the US *Sherman Act 1890*, as do the penal and injunction clauses. The Minister's second reading speech, by convention the major speech detailing the purposes of the legislation, also referred to the US *Inter-State Commerce Act of 1887* which dealt with rights, liabilities, and duties of common carriers engaged in Inter-State traffic and whose principle purpose was to:

- secure just and reasonable charges for transportation;
- prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions;
- prevent undue or unreasonable preference to persons, corporations or localities; and
- abolish combinations for pooling freights.

That Act also created the US Inter-State Commerce Commission[4]. The Minister went on to refer to the *Wilson Bill of 1894*, the *Exhibitions Act of 1903*, the *Commerce and Labour Act of 1903*, and the *Elkin Act of 1903*. The Minister also referred to Canadian and New Zealand legislation dealing with dumping.

This *Australian Industries Preservation Act 1906* was amended in 1906, 1907, 1909, 1910, and 1930. It was repealed in 1965 after a relatively ineffectual life. There was a successful constitutional challenge in *Huddard Packer v Moorhead* in 1910 when the High Court held that sections of the Act that sought to regulate the conduct of corporations were beyond the Commonwealth's legislative powers. Again in 1912, the Commonwealth failed in the *Adelaide Steamship Co. Ltd v Attorney-General* in alleging restraint of trade and monopolisation. In this case, the British Privy Council, at the time the highest appeal court for Australia, found that the Commonwealth had failed to establish that a collective agreement providing for exclusive dealings and price maintenance was to the detriment of the public interest. The Court regarded the parties as acting only in the protection of their own legitimate business interests. Consequently, this decision reflected English precedents allowing such restrictive agreements in restraint of trade on the basis of freedom of contract. Similar State legislation was also rendered ineffective.

The second major attempt at legislating against restrictive trade practices generally at the Commonwealth level was the *Trade Practices Act 1965-71*. This followed an announcement in March 1960 by the Commonwealth government of an intention to consider the introduction of legislation against monopolies and restrictive trade practices.[5] Following an examination of trade practices legislation in the United States, Canada and the United Kingdom, the government presented proposals for legislation in December 1962. These proposals, developed by Sir Garfield Barwick and his advisers, were strongly influenced by the limited approach of the UK *Restrictive Trade Practices Act of 1956*, compared to the broad prohibitions of the US law. It proposed a process of registration and adjudication of the lawfulness of a practice by an administrative tribunal. This particular proposal was not proceeded with, and a modified proposal was introduced in March 1965. The restrictive approach was justified on the basis that there might be some restrictive practices that were in the public interest.[6] Interestingly, this Bill contained no provisions for controlling mergers or takeovers. According to the Minister, there were difficulties relating to the mechanics of such controls and the Government was conscious of the need to take advantage of economies of scale. This legislation reflected a concern with the extent of restrictive trading arrangements being implemented through trade associations.[7] For example, a Western Australian Royal Commission on Restrictive Trade Practices reported in 1958 that such practices as channelling distribution, price fixing and control, and collective tendering were widespread. A similar Tasmanian Commission in 1965 reported that the majority of the 600 business associations in Australia had agreements to eliminate or reduce competition. This Act and related successors were criticised as being inefficient, slow and costly and also because examinable agreements or practices remained operative until restrained by the Tribunal.[8]

The *Trade Practices Act 1974* was the third major attempt to introduce effective general trade practices legislation in Australia. It shifted the emphasis from a case-by-case examination of particular agreements or practices, which had characterised the 1965-71 Act, to a series of proscriptions based on US antitrust legislation. In introducing the Bill in the Senate in 1973 the then Attorney-General and Minister for Customs and Excise, Senator Murphy, said that the purpose of the Bill was to control restrictive trade

practices and monopolisation and to protect consumers from unfair commercial practices. The Minister went on to say:

> "Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and feather bedding of industries.
>
> "In consumer transactions unfair practices are widespread. The existing law is still largely founded on the principle known as caveat emptor - meaning let the buyer beware. That principle was far more appropriate for transactions conducted in village markets than for modern consumer-oriented transactions today. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is often no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable only to the vendor. The consumer needs protection by the law and this Bill will provide such protection."[9]

The Minister concluded that the Bill was intended to promote efficiency and competition in business, to reduce prices, and to protect all Australians against unfair practices. As indicated above, much of the Act was intended to protect the process of competition from abuse of market power. However, Part V dealt with a wide range of practices that were considered to be unfair and was primarily intended to protect consumers. Nevertheless, Section 52 forbidding false or misleading conduct in trade or commerce had general application.

Thus the *Trade Practices Act 1974* in its initial form involved a substantial statutory interference in freedom of contract. Not only was it intended to promote economic efficiency, it was also intended to promote fairness both in competition, and in dealings

between businesses, and between businesses and consumers, and to promote honesty in the provision of information. Thus it legislated directly on the question of what constituted just behaviour in trade and commerce. The inference to be drawn was that in enacting this legislation, the Government and Parliament had accepted that market forces left to themselves would not produce just outcomes. Nor would they produce economically satisfactory outcomes.

Since the enactment of that legislation in 1974, there have been at least eighteen major reports, or legislative proposals dealing with proposals to amend the Act to strengthen the regulation of unfair business practices, that is to amend what was considered just in economic relationships. These were:

- Trade Practices Act Review Committee (Swanson Committee), August 1976;
- Trade Practices Consultative Committee: Small Business and the Trade Practices Act (Blunt Committee), December 1979;
- The Trade Practices Act Proposals for Change, February 1984;
- *Trade Practices Revision Act 1986*;
- Two Exposure Drafts of a Franchise Agreement Bill, 1986;
- Ministerial Council Statement abandoning draft franchise legislation, 1987;
- House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee), Mergers, Takeovers and Monopolies: Profiting from Competition? 1989;
- Trade Practices Commission Discussion Paper, 1989;
- Small Business in Australia - Challenges, Problems and Opportunities, Report of the House of Representatives Standing Committee on Industry, Science, and Technology (Beddall Committee), January 1990;
- Government Response to the Report of the House of Representatives Standing Committee on Industry, Science and Technology, November 1990;
- Unconscionable Conduct and the Trade Practices Act, Possible extension to cover commercial transactions, Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, July 1991;
- Report by the Senate Standing Committee on Legal and Constitutional Affairs, Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls (Cooney Committee), December 1991;

- Report by the Franchising Task Force to the Minister for Small Business and Customs, the Hon David Beddall MP, December 1991;
- Review of the Franchising Code of Practice, by Robert Gardini, October 1994;
- Report by Working Party to the Minister for Small Business, Senator Schacht on the Need to Amend Section 51AA, February 1995;
- Better Business Conduct, Discussion Paper, Department of Industry, Science and Technology, 25 October 1995;
- *Trade Practices (Better Business Conduct) Bill 1995*; and
- Fair Trading Inquiry 1996-7 by the House of Representatives Standing Committee on Industry, Science and Technology (Reid Committee).

From the weight of consideration given, it is apparent that this was a policy debate of considerable political significance, in which mainly big business interest groups opposed proposals for stronger legislation coming mainly from small business interest groups, though there were parallel proposals from consumer groups.

**Trade Practices Act Review Committee (Swanson Committee), August 1976**[10]

The new Fraser Liberal Government, appointed in controversial circumstances in November 1975, decided to review the operations of the former government's Trade Practices legislation. The terms of reference, announced by the then Minister for Business and Consumer Affairs, the Hon John Howard MP, on 1 April 1976, covered whether the Act was achieving its purposes and benefiting consumers and whether it was causing unintended difficulties or costs.

In its report, the Swanson Committee was concerned with the concept of 'competition' underlying Part IV of the Act and with the abuse of undue market power. The Committee described competition in standard economic terms, seeing it as a process rather than a situation, involving the degree of market concentration, barriers to entry, the extent of extreme product differentiation and sales promotion, the character of vertical relationships, and the restrictive nature of any agreements between firms.

The Committee went on to examine a number of specific issues raised throughout the Fair Trading debate. Firstly, the Committee was concerned about rights on the termination of Termination of Franchise Agreements. The terms of contracts relating to termination or non-renewal of franchise agreements often reflect a balance of power

weighed heavily in favour of the franchisor. Drawing attention to overseas regulatory action, particularly in the USA, the Swanson Committee considered that franchisees should be able to secure fair compensation for their investment, including goodwill, upon termination of their franchises and that such a provision should be read into every relevant contract. Thus the committee considered that contract terms in franchise agreements could not be left simply to the parties to determine, but needed to include legislated standards of conduct. The Committee, referring to the Fourth Report of the Royal Commission on Petroleum, recommended that that any franchise legislation should be enacted at the Commonwealth level and should be quite general in incidence, rather than designed for a particular industry.

The Swanson Committee pointed out that in consumer transactions the balance of bargaining power had shifted in favour of the seller as a result of the substantial increase in the range of products available, the confusing number of available options, and the development of sophisticated and persuasive mass-marketing techniques. Consequently, the Committee recommended that Part V of the Act be strengthened and extended. Again, the Committee was attempting deal with the asymmetries of power and information that were involved particularly in transactions between large corporate organisations and individual consumers. It also recognised at a practical level that individual preferences were open to influence and manipulation and could not be treated simply as 'sovereign'. Importantly, in this context, the Committee recommended strongly that the definition of a 'consumer' should be sufficiently broad to provide protection to a range of business transactions, particularly purchases by small businesses. This was a tacit recognition of the existence of asymmetries of power and information in the relationships between big business and small business.

A number of submissions to the Committee had sought the introduction of prohibition of unfair methods of competition and unfair or deceptive acts or practices along the lines of Section 5(a) (1) of the US Federal Trade Commission Act. The Federal Trade Commission's definition of 'unfair' is very broad:

1 Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise —whether in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness;

2 Whether it is immoral, unethical, oppressive, or unscrupulous;

3 Whether it causes substantial injury to consumers (or competitors or other businessmen).[11]

It is important to an understanding of this definition to realise that US courts adopt a far less strict and literal approach to the interpretation of statutory language than do Australian courts. Thus this definition gives US courts a very wide discretion to overturn business arrangements for reasons which are openly acknowledged to be moral reasons. A number of submissions also recommended that the Trade Practices Act be amended to allow relief to be given against harsh or unconscionable contracts.

These submissions set the agenda for the subsequent debate. The Committee concluded that a general prohibition of 'unfair' conduct could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions, but gave no substantial reason why Australian conditions were different from those of the United States. Given the narrow interpretation of statutory language in Australian courts, this claim is open to strong dispute. Nevertheless, the Committee did see advantages in prohibiting unconscionable conduct or practices, but as a civil matter only. The Committee preferred a prohibition of 'unconscionable conduct or practices', rather than 'harsh or unconscionable contracts', believing that 'harsh' was an uncertain concept. Of course, the word 'unconscionable' had its origins in Equity. The Committee also recommended that fairly detailed legislative guidance be given on the kinds of conduct considered unconscionable; such factors as the commercial nature and setting of the practice, the complexity of any contemplated or executed transaction, and the relative ability of the parties to understand the transaction and protect their interests. The effect of this proposal would have been to broaden significantly the existing equitable doctrine of unconscionability allowing courts the discretion to decline to enforce contracts. These recommendations mark the central issue throughout the Fair Trading debate – the extent to which the Commonwealth should legislate to prohibit unfair conduct in trade or commerce thus undermining the restrictions placed on Equity throughout the nineteenth century under the positivist influences already discussed.

In total, the Swanson Committee made 139 recommendations, many involving significant amendment of the Act. A large number of these were subsequently enacted

as the *Trade Practices Amendment Act of 1977*. Included was a strengthening of Section 52 dealing with false or misleading conduct, but not a general prohibition of unconscionable conduct. There is no information on the public record of the reasons for the Government's rejection of this aspect of the Committee's recommendations.

**Trade Practices Consultative Committee: Small Business and the Trade Practices Act (Blunt Committee), December 1979**[12]

This Committee was asked in December 1978 to examine the relationship between the restrictive trade practices provisions of the Trade Practices Act and small business having regard to the Government's high priority for the development of small business. Subsequently, the Committee was asked whether there was a need for specific legislation regulating franchise agreements.

Among other matters, the Blunt Committee focused on the abuse of market power by large businesses in their relations with small businesses, in particular, price discrimination involving franchised dealers in the motor trades. These are situations in which there are large asymmetries in power and information between the manufacturers who are large transnational companies, and local franchised dealers.

The Blunt Committee Report discussed at some length the various objectives of competition rules such as are found in Part IV of the *Trade Practices Act 1974* and the US Anti-Trust laws, for example to limit the accumulation and use of power, including 'social' power, by individual large firms. The Committee suggested that this might be justified on the basis that fragmenting economic power through many independent proprietors is desirable in itself. In doing so, it cut across the understanding of the operation of competitive markets that had been current in the time of the classical economists, and which is incorporated in the idea of perfect competition. The Committee rejected this justification as principally structural, as ignoring the efficiency and growth potential of big business or its actual conduct. They considered it was inappropriate to have laws directed primarily at industry structure, a position that seems to reflect the confusion in contemporary economic ideas of competition.

In relation to fair trading, the Blunt Committee acknowledged that the ideas that 'businessmen' should receive equal treatment in similar situations and should deal 'fairly' with consumers was intuitively attractive. However, the Blunt Committee

objected that the concept of fairness was elusive and not susceptible to 'objective assessment', believing that fairness resided only in the eye of the beholder and depended on the circumstances of individual cases. Thus there was a failure to understand that standards of fairness are socially constructed and are not purely individual, and that consumer behaviour is influenced by such standards.[13] These concerns, of course, reflect the nineteenth century assumptions underpinning classical contract law. The appeal to 'objectivity' embodies the rationalist aspirations of the Enlightenment with its attempt to privilege a particular form of dialectic, and the attempt to privilege individual exchange and private arrangements over other values. The Committee was also concerned that insisting on a standard of fairness would require the replacement of competition by detailed regulation of individual transactions by either the courts or officials. Again this concern to avoid detailed inquiry into particular circumstances was part of both the Enlightenment program and of classical contract law.

Nevertheless, the Blunt Committee acknowledged that some of the competitive provisions of the Trade Practices Act reflected a number of aims including the protection of small business and the promotion of fairness. The Blunt Committee considered that Part IV of the Act was directed primarily against anti-competitive conduct working against the attainment of economic efficiency, a claim running counter to the intentions of the legislation as described in the second reading speech cited above. The Committee noted with interest a submission from the Law Council of Australia seeking a general prohibition of harsh, unconscionable or unfair conduct irrespective of whether or not the conduct involved injury to competition or abuse of market power. The Law Council submission argued that fairness in competition was a concept separate from, and distinct from, freedom of competition, that both were vital, and that the *Trade Practices Act 1974* already prohibited some practices as unfair, even though competition was not affected. This distinction nicely sums up what the debate was about. Consequently, the Law Council argued for a general prohibition of harsh, unconscionable or unfair conduct, disagreeing with the Swanson Committee view that such a provision would result in a considerable degree of uncertainty in commercial transactions. Their preference was for the formula 'harsh or unconscionable' and considered that detailed legislative guidance on what sort of conduct came under those headings was unnecessary. Rather they drew attention to the definition of 'unfair' used

by the US Federal Trade Commission and endorsed by the US courts. The Law Council also saw such an amendment as dealing adequately with unfair conduct in franchising relationships.

However, the Blunt Committee reported that it saw the aim of Part IV of the Act as being to promote economic efficiency through the maintenance of the competitive process. Thus they saw a law prohibiting 'unfair' business conduct as going further, and not being compatible with, the provisions of Part IV because the provisions regulate conduct according to the competitive effect of the conduct and not, as a law based on 'fairness' would, on its morality. The Committee saw it as having a very wide impact beyond the then boundaries of Parts IV and V. Nevertheless, the Committee said that there was great merit in debate on the proposal and suggested that the Government keep it under active examination. The confusion in the Committee's analysis, including its narrow interpretation of the intentions of the *Trade Practices Act 1974*, will be taken up in the next Chapter.

The Blunt Committee went on to considered franchising in some detail, supporting the Swanson Report recommendations regarding the termination of franchise agreements, and drawing attention to continuing concerns regarding petroleum retailing and the termination of service station franchises. The Government had already announced an intention to enact a specific franchise law for the retail petroleum industry, but the Blunt Committee, like Swanson, supported a more general law. The Committee pointed to a general trend in the United States at both federal and state level for special statutory regulation of franchise relationship to maintain a 'fair' position for franchisees. The Committee was particularly concerned to impose a positive obligation to disclosure of full information about franchisors and the commercial viability of franchises being sold. In this regard, the Committee could see very little difference between the objectives of company law and its proposal. The Committee recommended that any legislation to deal with these franchising concerns should be included within the Trade Practices Act, setting out in detail the clauses it wished to see enacted. The Committee did not perceive the inconsistency between its position on specific legislation to promote fairness in franchising, and its position on fair trading more generally.

**The Trade Practices Act Proposals for Change, February 1984**[14]

In February 1984, the Attorney-General, the Minister for Home Affairs and Environment and the Minister for Employment and Industrial Relations in the new Labor Government released a Green Paper containing proposals for changes to the *Trade Practices Act 1974*.

In addition to raising the monetary limit in the definition of a consumer, the Government proposed to amend the Act along the lines recommended by the Swanson Committee, inserting a new Section 52A prohibiting corporations, in trade or commerce, from engaging in unconscionable conduct in relation to contracts. Included in the draft Bill were a long list of issues which the courts could take into account in assessing the unconscionability of contracts:

- The relative bargaining strengths of the parties;
- Whether any provisions would be unreasonably difficult to comply with or would not be reasonably necessary for the protection of the legitimate interest of any party;
- Whether its provisions were the subject of negotiation and, if so, whether any party could have negotiated successfully for the addition, omission or variation of any provision;
- The consequences reasonably foreseeable at the relevant time of compliance or non-compliance with, or contravention of, any or all of the provisions of the contract;
- Whether, any party to the contract, prior to the relevant time, failed to disclose information of a material kind to any other party;
- Whether any provisions would limit the liability of any party for any breach and the remedies available;
- Whether any party or representative was not reasonably able to protect his interests because of his age or the state of his physical or mental capacity;
- The relative economic circumstances, educational background and literacy of each party or representative;
- The form and intelligibility of the contract;
- The extent to which the provisions and their legal and practical effect were accurately explained;

- Whether any undue influence or unfair pressure was exerted on, or unfair tactics were used against, any party or representative;
- In the case the acquisition of goods or services, the difference between the price of the identical or equivalent goods or services from an alternative supplier;
- Whether, and the extent to which, the contract as a whole favours any party;
- The commercial or other setting, and the purpose and effect, of the contract or proposed contract; and
- The conduct of the parties in relation to any similar or related contracts.

It is interesting that the proposed Bill used the term 'unconscionable' to describe the conduct being prohibited. This would have significantly extended the equitable doctrine of unconscionability well beyond consideration of procedural matters, to which late nineteenth century and twentieth century judge-made law had limited it, to the substantive consequences of a contract. This exposure draft provoked a wide range of submissions to the Attorney-General, leading to a significant watering down of the government's intentions. There is no substantive information on the public record as to the contents of those submissions or of the reasons for the Government's decision.

**Trade Practices Revision Act 1986**[15]

In introducing this legislation on 19 March 1986, the then Attorney-General, Mr Lionel Bowen, said that the legislation was the result of a major review of the competition and consumer protection provisions of the Act, and of more than 120 submissions received following the exposure draft.[16] The Attorney-General said that the Government attached great importance to ensuring that the Act achieved its dual aims of promoting efficiency through competition, and providing consumers and business people with an appropriate measure of protection against unscrupulous traders. This statement is significant in that it contradicts the claim made by the Blunt Committee above, that the Act was primarily to do with economic efficiency.

The Government also said that it was committed to ensuring that unnecessary regulation was wound back, and adequate justification put forward for new regulation. This was at a time when economic rationalist ideas began to gain ascendancy within the Commonwealth Government.[17] As part of that growing ascendancy, there was a new

emphasis on the cost of Government regulatory activity, reflected in the establishment of the Business Regulation Review Unit within the Department of Industry and Commerce in about 1986, a unit with very extreme views as to what constituted regulatory activity and the undesirability of such regulatory activity.[18]

The Government indicated that following consultation with business, industry and consumer groups, the scope of the amendments had been 'refined' and the proposed section 52A was limited to a prohibition of unconscionable conduct by corporations in relation to consumer -type transactions. What the Minister did not acknowledge clearly was that the 'refinement' of the legislation represented a major weakening and narrowing of the original legislative intention. Thus, while the Minister used the words 'clearly unfair or unreasonable' to describe the intention of the legislation, he made no reference to the very limited interpretation of the doctrine of 'unconscionability' current in the courts and which did not encompass the meanings usually attached to those words. The Minister failed clearly to acknowledge that the legislation did not result in any general widening in the equitable doctrine of unconscionability, or that it denied promised protection from exploitive conduct to the small business sector, a result radically different from that proposed in the exposure draft. Of course, such obsecration is typical of ministerial announcements where promised actions are not implemented.

**Two Exposure Drafts of a Franchise Agreement Bill, 1986[19] and the Ministerial Council Statement abandoning draft franchise legislation, 1987**

In 1986, the Government also published two separate exposure drafts of a proposed Franchise Agreement Bill. Both exposure drafts were also discussed at length in the Beddall Report outlined below. In May 1987, the Commonwealth/State Ministerial Council decided not to proceed with the proposed franchise legislation and announced that it would do no more than exempt franchise agreements from the 'prescribed interests' provisions of companies and securities legislation. In making that decision, the Council claimed that adequate legal remedies already existed to protect the parties to a franchise agreement, referring to s52 of the Trade Practices Act.

**House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee), Mergers, Takeovers and Monopolies: Profiting from Competition? 1989**[20]

The Griffiths Committee, in a short comment on the issue of fair trading, pointed to the extensive opposition to proposals to extend the unconscionable conduct provisions in Section 52A of the *Trade Practices Act 1974* (the section enacted in 1986 discussed above) to commercial transactions. The Committee considered that if the Trade Practices Commission wished to pursue the proposal, it needed to develop persuasive arguments to counter the concerns of the business community and legal profession in this regard. Clearly, the 1986 amendments had failed to satisfy a substantial body of opinion, including the Trade Practices Commission, the body charged with administering the Act, and, at that time, the Commission thought that a problem that should be addressed.

**Trade Practices Commission Discussion Paper, 1989**[21]

This failure led the Trade Practices Commission in 1989 to ask Baker & McKenzie, a prominent Australian legal firm, to assist the Commission to develop a proposal to expand section 52A of the Trade Practices Act to cover 'small business dealings". In the process, Baker & McKenzie prepared a discussion paper identifying problems in the areas of retail tenancy, loan guarantees, franchising, the abuse of buying power, government conduct and petroleum franchising.

In order to test the extent of existing remedies, Baker & McKenzie prepared and settled with the Trade Practices Commission a list of examples of questionable conduct. Baker & McKenzie concluded that the existing legislation provided only limited relief.

**Small Business in Australia - Challenges, Problems and Opportunities, Report of the House of Representatives Standing Committee on Industry, Science, and Technology (Beddall Committee), January 1990**[22]

On 24 March 1988, the Minister for Science, Customs and Small Business requested the House Of Representatives Standing Committee on Industry, Science and Technology to investigate the unique problems of small business as a result of extensive, yet

fragmented regulations, and ways in which the administration of regulations could be improved.

These terms of reference clearly exhibit a concern with, and focus on, the cost of regulatory activity to the small business sector. In relation to unconscionable conduct, the Committee noted that Section 52A of the Trade Practices Act, adopted in 1986, covered unconscionable conduct towards consumers only. The Committee recommended that Section 52A be extended to include small business transactions including retail/commercial tenancy agreements, where a small business is disadvantaged in the same way as a consumer, in its dealings with other parties. Again, this is a reference to the asymmetries of power and information that are inherent in these economic relationships.

The Beddall Committee also received considerable evidence concerning unfair commercial lease agreements resulting from the disparity of bargaining power between small businesses and landlords, particularly in shopping centre complexes and in motels. The terms and conditions of retail leases, high rents and 'outgoings' (the shopping centre management costs shared by tenants) were the principle causes of complaints. It was claimed that smaller retailers were paying disproportionately high rents and subsidising large retailers attracted to centres as anchor tenants. Additionally, costs, which should be borne by shopping centre management, were being passed on to tenants. High rent increases during the term of a lease also had a severe impact on small retailers. In summary, the lease agreements gave the landlords wide discretions about future rent increases and about outgoings, providing tenants with little certainty about the costs that they would be facing. The Shopping Centre Tenants Association argued that such a centres were an autonomous market for retail space, and consequently, the landlord could set the terms and conditions for leases without the threat of competition. While not fully accepting this assertion, the Committee considered that these centres offered prime retail space relative to traditional 'strip' retail shopping environs, and that the competition for space in such centres was more intense, while the single ownership of such centres placed shopping centre landlords in a more powerful position over their tenants than landlords of 'strip' retail space. To limit the opportunities for abuse of this superior bargaining power, the Committee recommended that Commonwealth, State and Territories formulate a standardised rental lease for commercial properties, and

introduce shop lease tribunals to arbitrate in disputes between landlords and commercial tenants. The broader question, of whether the growth of regional shopping centres were, themselves, the result of the growth of excessive market power and political influence on the part of major supermarket chains, department stores, and centre developers, combined with the access of the developers to tax privileged superannuation savings, was not addressed. This points to a potential breakdown in the relevant planning controls combined with a possible regulatory distortion in the capital market induced by other policy goals.

The Beddall Committee also gave detailed consideration to franchise agreements, pointing to three areas where franchise agreements acted against the interests of franchisees. These were the absence of any requirement for prior disclosure of information clearly outlining the rights and responsibilities of the two parties, the unilateral alteration of agreement by franchisors without prior notification, and the lack of clear cut statements on the basis for renewal, or the grounds for termination, of agreements. Again, there was a lack of certainty about the environment that franchisees would be facing and asymmetaries of power and information.

The Committee pointed to the two previous reviews of the *Trade Practices Act 1974* in the 1970s and their conclusion that the Trade Practices Act should be amended to overcome these franchising problems. The Beddall Committee supported separate legislation and went on to discuss at length the two exposure drafts of such legislation released by the Ministerial Council for Companies and Securities in 1986. The first draft Bill sought to ensure that franchisors dealt fairly with franchisees throughout their agreement by requiring the prior disclosure of relevant financial and management information, and of the terms under which they were to carry on their dealings. The majority of submissions on the first draft Bill opposed the Bill and it was redrafted. The Attorney-General's Department reported to the Committee that the first draft had been revised because it was considered to be too onerous on franchisors and was an unwarranted interference with the parties' 'freedom to contract'. The second draft Bill reduced the requirements for prior disclosure of financial and managerial information and for fair dealing with franchisees. Provisions concerning the protection of the interests of franchisees, such as the cooling off period, equitable supply of goods and services, termination of franchise agreements and related agreements, were also deleted.

This second draft was also severely criticised this time by franchisees who saw the second Bill as protecting the interests of franchisors as a result of pressure from franchisors, potential franchisors and larger business interests. In view of the criticism, the Ministerial Council decided in May 1987 not to proceed with the legislation. The Attorney-General's Department advised that the Ministerial Council had taken the view that section 52 of the Trade Practices Act already provided for adequate disclosure and the States were bringing their fair trading legislation into line with the *Trade Practices Act 1974*. There were also concerns about finding a satisfactory definition of franchising.

The Beddall Committee did not accept that a satisfactory definition of franchising could not be developed, pointing to the substantial body of franchising legislation in the United States and to the Petroleum Retail Marketing Franchise Act. Nor did the Committee agree that adequate remedies were already available to protect parties in franchise agreements. The Beddall Committee commented that this attempt to draft franchise legislation resulted had in an outcome which pleased neither franchisee nor franchisor, and that the attempt was abandoned for reasons having little to do with the adequacy of existing remedies at law. The Beddall Committee went on to recommend specific franchise agreement legislation requiring prior disclosure documentation, a cooling-off period, provisions for alteration to the agreement, and for termination/renewal or transfer of franchises.

**Government Response to the Report of the House of Representatives Standing Committee on Industry, Science and Technology, November 1990**[23]

It is normal practice for the Government to make a response to such Reports through a formal statement to the Parliament. The Government responded on this occasion that it would await the conclusion of an examination of the issue by the Trade Practices Commission before acting on the recommendations.

**Unconscionable Conduct and the Trade Practices Act, Possible extension to cover commercial transactions, Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, July 1991**

This was the report foreshadowed in the Government's response to the Beddall Report. In developing this report, the Trade Practices Commission released a discussion paper in October 1990 indicating that a substantial problem existed with approximately one third of complaints it received being about unfair conduct in commercial transactions. The report acknowledged that persistent small business problem arose from a disparity of bargaining power between the parties in relation to commercial tenancy agreements, loan agreements, small manufacturers and their suppliers, government conduct, and in the petroleum and building industries.

Most complaints remain unresolved, as they tended to fall outside the *Trade Practices Act 1974*. The Trade Practices Commission concluded that, on balance, there were economic benefits to be gained from the regulation of unconscionable conduct in commercial transactions in circumstances where the weaker party to a transaction suffers from an inability to protect its interests and advantage is taken of the circumstances. Although the equitable jurisdiction was capable of developing economically justifiable doctrines in relation to unconscionable conduct, the jurisdiction was still growing in a somewhat piecemeal and unpredictable way. The most appropriate way of regulating such conduct was to create a new part to the Act. The rationalisation and codification of the relevant principles developed in the Commission's report would do much to increase the predicability and certainty of their application by providing a guide to the courts. The involvement of the Trade Practices Commission would increase the business sector's awareness of unconscionable conduct through its high profile, its compliance programs and litigation where appropriate. The Commission emphasised that any potential benefits to be gained from regulating unconscionable conduct in commercial transactions could be neutralised unless there were meaningful access for small business to the legal remedies involved.

This report confirms the point made earlier that the Trade Practices Commission believed that a problem existed because of asymmetries of power and information in business transactions, particularly between big and small business, and that legislation addressing that problem was justified on economic grounds.

**Report by the Senate Standing Committee on Legal and Constitutional Affairs, Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls (Cooney Committee), December 1991**

On 16 May 1991, the Senate referred the adequacy of the *Trade Practices Act 1974* to the Senate Standing Committee on Legal and Constitutional Affairs. Amongst other things the Committee was asked to consider the extension of section 52A (unconscionable conduct) to all commercial dealings.

In its Report, the Cooney Committee noted the objections which had been raised against any extension of section 52A to commercial dealings:

- That replicating or 'codifying' existing equitable principles is unnecessary and undesirable - the Australian courts have shown a capacity to intervene in appropriate commercial circumstances, and a willingness to expand existing doctrines and develop new doctrines when necessary.
- Uncertainty would arise within commercial dealings.
- The principles governing the regulation of business in its relations with consumers should be quite separate from those governing relations between businesses, as even small firms necessarily possess a level of commercial sophistication not possessed by consumers.
- Simple extension of section 52A would have detrimental effect on its use by consumers.
- In the absence of any economic analysis, it was difficult to determine the financial impact that an extended provision would have on business. In this regard, the Law Council had submitted that an extended provision would increase the risk and the legal cost of doing business, and compound economic inefficiencies in carrying on business (for example, through being forced to compromise rights to avoid legal costs and delay).
- It was likely that an extended statutory provision would be used extensively in commercial disputes, with the potential to increase costs and delay and frustrate the enforcement of legal rights. An extended section 52A would be pleaded and could not be easily dealt with summarily as unconscionability was essentially a question of fact. If pleaded as a defence in enforcement proceedings, it would probably necessitate either a full trial or perhaps more likely a settlement.

- Extension of statutory unconscionability would provide an ineffective remedy, particularly for small business.
- The existing equitable principles dealing with unconscionable conduct, together with the traditional remedies for fraud, misrepresentation, duress, undue influence and mistake, estoppel, and section 52 of the Act, in combination, would provide an avenue for relief in most, if not all serious, cases where unconscionability arises.

Implicit in these objections was a view that extension of the equitable doctrine of unconscionability was inappropriate and that such matters were best left to the courts. The Cooney Committee noted, on the other hand, that extending the statutory prohibition against unconscionable conduct to commercial dealings was supported by a number of submissions:

- The existing provisions were arbitrary and illogical. Although they did not cover commercial dealings, they could nevertheless be used by businesses when they acquire 'consumer' goods and services. An individual could probably rely on they when guaranteeing a loan for the purchase of a house, but not in connection with a business.
- Were section 52A to have general application, then it would become as ubiquitous a remedy as section 52 had become, and uncertainty in the law would be reduced.
- The Trade Practices Commission considered that there were net economic benefits in regulating unconscionable conduct in commercial transactions.
- The Attorney-General's Department saw no argument of principle against a prohibition on 'unconscionable conduct' in commercial as well as consumer transactions, and favoured a prohibition on such conduct in trade and commerce generally. It considered any attempt to limit the extension to small business as artificial and arbitrary.

In conclusion, the Cooney Committee acknowledged that it would be consistent with the position at common law to introduce a statutory prohibition on 'unconscionable conduct' in commercial as well as consumer transactions. The Committee also noted the claims that there could be benefits in introducing such a prohibition such as increased business awareness of unconscionable conduct, both through the public

profile, education and compliance programs of the Trade Practices Commission and through their representative actions.

The Cooney Committee also accepted that any attempt to confine a statutory prohibition against unconscionable commercial conduct to small business would be arbitrary, artificial and productive of uncertainty. There was also the difficulty of defining what was small business, and there was no competition policy principle supporting the preferential treatment of small business over large business.

The Cooney Committee claimed that the relatively new Section 52A (the consumer provision discussed above) had rarely been used and that it did not enhance the protection afforded by the common law. The Committee was also concerned that a statutory provision like section 52A might not have the ability to develop in the way the common law could. Thus the Committee recommended relying on the common law alone, particularly as the courts had shown a willingness to expand the existing doctrines and to develop new equitable doctrines where justified. Accordingly, the Committee recommended that section 52A of the Trade Practices Act be repealed. Of course, this begged the questions of whether the courts had been tardy in expanding the doctrine of unconscionability and whether such an expansion was justified. It also recommended that Act be amended to permit the Trade Practices Commission to bring proceedings on behalf of persons who have an action at common law arising from the unconscionable conduct. The Committee further recommended that appropriate funds be made available to enable this to be done.

**Report by the Franchising Task Force to the Minister for Small Business and Customs, the Hon David Beddall MP, December 1991**[24]

This Task Force believed that concerns regarding inappropriate, fraudulent or misrepresented franchising systems should not be ignored. The Task Force pointed to franchisors who had failed to provide appropriate disclosure, were not members of the Franchisor's Association of Australia, and had not committed to any code of ethics or practices, and for whom there was no monitoring mechanism. The creation of a Franchising Code of Practice, supported by some government funding, arose out the report of this taskforce. It should be noted that the responsible Minister, Mr Beddall, had previously been Chairman of the House of Representatives Inquiry that had

produced the Beddall Report discussed above. There is no information on the public record as to whether the Minister had sought the introduction of franchising legislation.

**Trade Practices Amendment Act 1992**

This Act introduced a new section, 51AA, into the *Trade Practices Act 1974* in response to the political pressure reflected in the above inquiries. The section prohibited a corporation in trade or commerce from engaging in conduct that was unconscionable within the meaning of the unwritten law, from time to time, of the states and territories. The provision dealing with unconscionability in consumer transactions, the former section 52A, was renumbered 51AB. The amendments were not intended to create new legal rights but to provide a statutory endorsement of the equitable doctrine of unconscionability as determined by the courts. This opened unconscionability in commercial transactions to scrutiny by the Trade Practices Commission, and provided for representative actions by the Commission. It also allowed the remedies contained in sections 80 and 87 of the *Trade Practices Act 1974* to apply. This picked up one aspect of the Cooney Report recommendations outlined above.

**Review of the Franchising Code of Practice, by Robert Gardini, October 1994**[25]

This code of practice was reviewed at the request of the Minister for Small Business and Customs. Mr Gardini received more than 70 written submissions, and interviewed the directors of the Franchising Code Administration Council, franchisors, franchisees, banks, legal advisers and publishers. A one day workshop was also held to discuss the operation and effectiveness of the Franchising Code of Practice. Matters complained about included:

- charging excessive prices for goods supplied to franchisees;
- secret rebates and commissions from suppliers;
- discrimination in the terms of trade between company owned outlets and franchised outlets;
- encroachment on the franchisee's geographic trading area;
- failing to address lack of viability of franchised outlets;
- making substantial increases to renewal fees;

- failing to provide adequate service and support to franchisees;
- unwilling to discuss and negotiate problems;
- using advertising levies for other purposes;
- intimidation and victimisation of franchisees; and
- unfair terminations.

Mr Gardini reported that the main weakness of the Code had been its failure to provide sufficient coverage across the franchising sector with 40 to 50 per cent of franchisors not registered under the Code. Importantly, the motor vehicle industry had decided not to participate, as had significant areas of the real estate sector. He thought it unlikely that the Code would ever achieve more than 70 per cent coverage of franchisors. A significant number of non-registered franchisors failed to provide adequate disclosure, to offer a cooling-off period for new franchise agreements, and to observe the standards of conduct contained in the Code. Mr Gardini also found that the conduct provisions of the Code had not been effective in addressing serious franchise disputes. The unconscionable conduct provisions were too limited and the general standards of conduct provisions offered little practical assistance to franchisees who were in serious dispute with franchisors. Any attempt to strengthen the provisions of a voluntary code would result in a loss of registrations under that Code.

Mr Gardini made 15 recommendations, including a proposal that only those franchisors who register with the Franchising Code of Practice should qualify for the exemption for franchising contained in the Corporations Regulations. This was the exemption provided to franchisors by the Ministerial Council in 1987 from the prospectus requirements of the Companies Code.

**Report by Working Party to the Minister for Small Business, Senator Schacht on the Need to Amend Section 51AA, February 1995**[26]

This Working Party reported that Section 51AA of the *Trade Practices Act 1974*, which was enacted in 1992, was extremely limited in its application and was not addressing the problems with which it was intended to deal. The Working party recommended that section 51AA should be amended to prohibit unconscionable, harsh or oppressive conduct, broadening the restrictive equitable meaning of unconscionability contained in the existing provision. The Working Party believed that such a provision would not

lead to commercial uncertainty, pointing out that almost all jurisdictions in the United States had adopted a broad, general provision prohibiting unconscionability conduct (Section 2.302 of the US Uniform Commercial Code, a provision given broad application by United States courts). The Working Party recommended that Section 51AA be amended to prohibit unconscionable, harsh or oppressive conduct in trade or commerce. Further, the Working Party recommended that the Government appoint a Commissioner to the Trade Practices Commission with knowledge and experience of small business problems, that it give a specific direction to the Trade Practices Commission to fully enforce the provisions, and provide the Commission with adequate resources to do so.

This Working Party made a supplementary Report to the Minister for Small Business, in May 1995 to address issues not included in their earlier report. These included a response to arguments opposed to a widening of section 51AA, the review of the Franchising Code of Practice, and an analysis of the economic impact of widening section 51AA. The Working Party pointed out that the severe limits on the operation of the equitable remedy of unconscionability were well known to the Trade Practices Commission before Section 51AA was enacted, and that the administration and judicial interpretation of Section 51AA had confirmed those shortcomings. In commenting on the contrary views of the Victorian Employers Chamber of Commerce and Industry (VECCI), the Working Party believed that there was little or no relationship between market structures and unconscionable conduct. Further, the Working Party believed that VECCI's suggestion that the Trade Practices Act focused on market structure rather than conduct, was to grossly misunderstand the nature and scope of the Trade Practices Act. It is interesting to note, in passing, that this reference to market structure by VECCI is the very reverse of the argument used by the Blunt Committee in its opposition to legislation to prohibit unfair business practices.

The Working Party criticised the claim made by VECCI that a change to legislation would have no impact on the incidence of unconscionable conduct and that the words 'unconscionable, harsh and oppressive' lacked precision. The Working Party claimed that such words had a long history of judicial interpretation pointing to NSW *Industrial Relations Act 1991* and the NSW *Contracts Review Act 1980*. The Working Party did not recommend the use of the word 'unfair', notwithstanding the judicial interpretation

given that word 'unfair', to avoid substantial criticism from big business as to the meaning of unfairness. In any event, any business uncertainty had to be balanced by the need to do justice.

The Working party went on to draw attention to advice sought from Access Economics, a Canberra consultancy firm, on the economic consequences of extending the unconscionability provisions. Access Economics argued that similar protection should be provided to producers of goods and services as to consumers, as the damage done is economically indistinguishable, and similar remedies should be available. Provided that economic efficiency was not adversely effected, measures that improve fairness should be regarded as worthwhile. In particular, horizontal equity was a well established distributional objective to which public policy should have regard. Those who argue that, from an economy-wide perspective, unconscionability in commercial transactions is not a major issue are assuming that unconscionability in commercial transactions is a zero-sum issue with little or no change in welfare for the economy as a whole. Those holding that view can only object to measures that promote horizontal equity if it is at the expense of significant additional regulatory or other costs that impair efficient business operations. In that case, there is a need to balance efficiency costs against equity improvements. The argument that such a provision would increase business uncertainty also needed close scrutiny. The result could be less uncertainty overall, or a more even distribution of uncertainty as between the parties to a commercial contract.

**Better Business Conduct, Discussion Paper, Department of Industry, Science and Technology, 25 October 1995.**[27]

This paper, which released for public comment proposed new amendments to the *Trade Practices Act 1974*, pointed to the reluctance of the courts to interfere in commercial bargains, for fear of allowing parties to unfairly avoid situations of their own making. It suggested that this was to avoid commercial activities being subject to excessive levels of uncertainty. This view had been affirmed by the High Court as recently as 1992:

> "The law in general leaves every man at liberty to make such bargains as he pleases and to dispose of his property as he chooses. However improvident, unreasonable or unjust such dispositions may be, they

> are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances."[28]

Thus, under the existing law, a court would invalidate commercial bargains only in limited circumstances such as provided for in Section 52 of the Trade Practices Act prohibiting misleading and deceptive conduct. This confirmed the limited view of the impact of the Equitable doctrine of unconscionability reflected in the advice from Baker & McKenzie in 1989.

The Discussion Paper claimed significant policy issues arose where a firm is denied practical choice, so that it is unable to adequately protect its own interests. The Discussion Paper examined the impact of such 'economic ransom' on the franchising, petroleum and retail tenancy sectors. It advanced an economic argument for legislation using the concept of contestability - the ease with which firms can enter or leave an industry. In a perfectly contestable market, firms would not be able to impose harsh or oppressive terms on one another, and parties would be able to leave an industry without significant economic penalty where the economic returns were less than the party's expectations. Of course, the conditions for perfect contestability cannot be met, and Government actions, under the rubric of competition policy, are sometimes necessary to improve contestability and restore choice in commercial relationships. The discussion paper particularly pointed to the barrier to exit created by the existence of sunk costs financed by borrowings against the family home. These sunk costs leave small businesses open to exploitation.

> Disparity of bargaining power arising from the existence of sunk costs could therefore result in abuse, allowing a stronger party to exploit another in a manner that was harsh or oppressive and out of kilter with prevailing market conditions. The Discussion Paper concluded that the policy of encouraging free and fair competition therefore justified legislation to proscribe such conduct. These are the same issue of an asymmetry of power in commercial relationships that has been noted throughout the debate. There is no information on the public record as to the content of any submissions made to the Government in response to this discussion paper.

**Trade Practices (Better Business Conduct) Bill 1995**

This Bill, based, in part, around the proposal in the Better Business Discussion paper, was introduced into the Senate in November 1995. The opposition indicated that it would refer the Bill to a Senate Committee for further consideration. In the event the Bill lapsed with the calling of a Federal election in February 1996. The clauses of that Bill are discussed at length in the Reid Report (account following), and will not be discussed here.

The Coalition's 1996 Small Business Policy, *A New Deal for Small Business*, committed a Liberal/National Coalition government to ensuring that the *Trade Practices Act 1974* responded to the needs of the small business sector. It went on to claim, however, that complex 'black letter' law of the sort that was proposed in the Better Business Conduct Bill would stifle the dynamics of the small business sector and lead to greater uncertainty and cost. Thus, this policy picks up the economic rationalist concern about the economic cost of government regulation noted earlier, as well as the positivist emphasis on certainty that was a feature of classical contract law. The Coalition placed emphasis on flexible, industry specific Codes of Practice and undertook to review existing self-regulatory codes. Nevertheless, the policy committed a Coalition government to considering amendment to the *Trade Practices Act 1974* to complement the effectiveness of Codes of Practice, and the establishment of education programs.

In response, the Motor Trades Association of Australia (MTAA) wrote to the then Leader of the Opposition, the Hon John Howard MP, expressing concern at the Coalition's small business policy and its deriding of what it called 'complex black letter law'. The MTAA pointed out that it had met with Mr Andrew Robb of the Liberal Party Campaign Headquarters on 16 November 1995, when they were given to understand that the Coalition would support the Better Business Conduct Bill. MTAA also drew attention to an assurance from the Federal Director of the National Party that the National Party supported strengthening the 'harsh and oppressive conduct provisions' of the *Trade Practices Act 1974* . The MTAA said that their experience with the operation of Codes of Practice demonstrated that they could only be effective if underpinned by that Act. Mr Robb replied to the MTAA on 29 February 1996, expressed reservations about the Better Business Conduct Bill and undertook to refer

the issue to a Senate or other Parliamentary Committee in the event of a Coalition victory.[29]

**Fair Trading Inquiry 1996-97 by the House of Representatives Standing Committee on Industry, Science and Technology (Reid Committee)[30]**

Following the Coalition's election victory, the Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP asked the House of Representatives Standing Committee on Industry, Science and Technology in June 1996 to conduct an inquiry into 'Fair Trading'. Because it represented the culmination of the debate the Terms of Reference are reproduced in full:

> "1. The Committee is asked to investigate and report on:
>
> - the major business conduct issues arising out of commercial dealings between firms including, but not limited to, franchising and retail tenancy; [and]
> - the economic and social implications of the major business conduct issues particularly whether certain commercial practices might lead to sub-optimal outcomes.
>
> 2. The Committee is asked to examine whether the impact of the business conduct issues it identifies is sufficient to justify Government action taking into account, but not limited to:
>
> - existing State and Commonwealth legislative protections;
> - existing common law protections;
> - overseas developments in the regulation of business conduct.
>
> 3. The Committee is asked to examine options and make recommendations on strategies to address business conduct issues arising out of dealings between firms in commercial relationships, taking into account, but not limited to:
>
> - the potential application of voluntary codes of conduct, industry self-regulation and dispute resolution mechanisms, including alternatives to legislation and court-based remedies, and mechanisms to support these measures;

- legislative remedies.

4. In developing options, the Committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimising the regulatory burden on business, and keep litigation and costs to a minimum.' [31]

Attention in particular is directed to the reference in (1) to sub optimal outcomes and in (4) to certainty and to minimum regulation, themes that have already been met throughout the debate.

For its part, the new opposition reintroduced its Better Business Conduct Bill into the Parliament, but, of course, no debate occurred on that Bill.

The Reid Inquiry tabled a bipartisan report, *Finding a Balance towards Fair Trading in Australia*, in the House of Representatives in May 1997. That Report concluded that concerns about unfair conduct towards small business were justified and should be addressed urgently. To this end, the Report made wide-ranging recommendations to induce behavioural change on the part of big business towards small business and to provide adequate means of redress. The report was unanimous with a specific additional recommendation from one member regarding franchising. In summary the recommendations covered:

- the inadequate role taken by the Trade Practices Commission to date;
- Commonwealth facilitation of uniform State and Territory retail tenancy legislation and a retail tenancy code backed by the *Trade Practices Act 1974*;
- generic franchising legislation;
- representative actions by the Trade Practices Commission in respect of Part IV of the Trade Practices Act;
- a range of measures regarding the finance sector's treatment of small business;
- major amendments of the *Trade Practices Act 1974* prohibiting unfair conduct in trade or commerce;
- mandatory pre-trial mediation of unfair conduct disputes; and
- an educational campaign for small business entrants.

The Committee reported that they had taken evidence on a wide range of business conduct damaging to small business. These included:

- disputes between retail tenants and their landlords;
- disputes between franchisors and franchisees;
- the misuse of market power by large firms competing with small businesses; and
- harsh conduct by banks and other financial institutions towards small business clients.

The Committee saw a common theme underlying the unfair business conduct raised, namely an inequality of power. The result was a bias in business dealings in favour of powerful companies with the financial resources to engage in lengthy litigation. The consequence has been that small business people were open to arbitrary or opportunistic conduct with an associated economic and social cost. The Committee also pointed to a lack of adequate research into small business failures in Australia, and to an absence of any formal research in evidence tendered to the Committee. Nevertheless, the Committee was convinced by the anecdotal evidence provided by the numerous small business people that unscrupulous conduct of big business towards small business was a serious problem causing significant social damage. The Committee was conscious that in a competitive economic environment many businesses will fail. But that awareness did not exclude the need to examine the causes of failure, and action to alleviate its adverse consequences. The Committee was convinced that the social impact was sufficient to justify the actions it proposed. But the Committee was also convinced that unfair business conduct was having a serious adverse economic impact.

While acknowledging the inadequacies of the previous regulatory control regime, the Committee was strongly critical of the efforts of ACCC in relation to small business disputes. It believed that there was a need to establish a body of precedent under proposed new provisions in the *Trade Practices Act 1974* as quickly as practicable. The Committee's extensive recommendations included a very strong amendment to the Trade Practices Act to prohibit 'unfair' conduct, a proposal that would have replaced the equitable doctrine of unconscionability with a much wider statutory provision extending to the substantive outcomes of agreements. In addition, there were provisions to back

industry codes of practice with the Act, effectively making them mandatory, as well as proposals for a separate Franchising Act and a national retail tenancy code.

The strength and breadth of the Committee's Report came as a surprise to many observers including small business representatives. It ran directly counter to the rhetoric of deregulation that has surrounded much recent public policy debate, including the rhetoric contained in its own terms of reference. That rhetoric was reflected in a major policy statement in regard to small business by the Prime Minister, The Hon John Howard, on 24 March 1997, *More Time for Business:*

> "We must guard against the tendency for business regulation to increase over time as issues are considered in isolation or without systematic reference to their impact on business costs. . . The costs and benefits of regulation will be weighed up carefully to ensure that the putative benefits are not outweighed by excessive economic and financial costs, including the compliance burden on business."[32]

As could be expected, small business representatives warmly welcomed the Committee's Report, while big business representatives were much more reserved. For example, The Pharmacy Guild of Australia,[33] in welcoming the report, called for an immediate priority to be given to its implementation, and reminding the government of pre-election policy commitments. The Pharmacy Guild was one of a number of small business groups that participated in a joint media conference on 27 May 1997. Other participants were the Australian Council of Professions, the Australian Petroleum Agents and Distributors Association, the Australian Small Business Association, and the Motor Trades Association of Australia. A statement issued on behalf of these organisations described the Reid Report as one of the most important documents likely to be considered by the Government in its first term of office.

On the other hand, an editorial in the *Australian Financial Review* on 26 June 1997 attacked the Committee's Report as naive on the basis that economic competition was desirably deliberate and ruthless. The editorial claimed that requiring fair conduct from banks or large shopping centre managers in dealing with their clients and tenants would be a restriction on their ability to compete and that small business would suffer as a result. The Property Council of Australia commissioned Access Economics to produce

an 'independent' response to the Reid Report. Their document, *Tipping The Balance?*[34] focused on the retail tenancy aspects of the Report. Access Economics claimed that the Report was not consistent with its terms of reference in that it would promote 'sub-optimal economic outcomes' as well as increasing the regulatory burden on retail businesses. Additionally, the Report was said to be internally inconsistent, and to have paid scant regard for hard data on retail industry performance. In the process, it criticised the Report's reliance on anecdotal evidence from small business operators and small business groups and from competing expert witnesses. Of course, the Property Council of Australia, as the peak body representing shopping centre owners, had made submissions to the Inquiry, had appeared as witnesses at public hearings, and had been closely questioned by Committee members. The Executive Director of the Australian Retailer's Association, Mr Phil Naylor, responded that the Access Economics analysis was a scare tactic to water down the inquiry's findings.[35]

The particular data on which Access Economics relied had also been provided to the Inquiry by the Property Council of Australia, and was cited in the Inquiry Report.[36] In these circumstances, the claim made by Mr Geoff Carmody, Director of Access Economics, in his Foreword, about the independence of their response lacks credibility. Rather, it provides an example of the partisan use made of economic analysis in public policy debate. It also provides an example of the demands made by economists generally that the forms of analysis used in public policy debate be confined to formal economic analysis, and that the direct experience of those involved in markets be disregarded. In supporting the Access Economics analysis, P P McGuinness claimed that the Committee's report relied on emotion, prejudice and a desire to cater for to the voters.[37] This disparagement of emotion is, of course, a direct result of the Enlightenment's negative attitude towards it as part of its elevation of instrumental rationality, while the disparagement of politics is also typical of the economic rationalist commitment to markets and to positivism. He asserted that the fact that the Property Council had paid for the Access Economics study had no impact on the findings. On the other hand, McGuiness saw the bipartisan House of Representatives Report as a classic case of an attempt to enrol political power and anti-competitive regulation in the cause of ripping-off consumers. He suggests that, like farmers, shopkeepers seem to compensate for their hard work by inveterate whingeing. This one-sided application of capture theory also appears typical of economic rationalism. Only the economic

rationalists can be trusted to present views untainted by self-interest, a view peculiarly inconsistent with their own theories.

In addition, business correspondents in the letters columns argued that judges had rightly been reluctant to rewrite business contracts imposing standards of fairness because of the need for predicability in business dealings, a theme noted already. From this perspective, the real winners would be the lawyers helping judges determine what was fair or unfair. On the other side, Professor Andrew Terry argued in the *Australian Financial Review* on 27 June 1997 that the Committee's recommendations would not damage the economy, but would lead to a much needed extension and clarification of the law. Professor Terry had made a submission to the Inquiry advocating tighter regulation of the Franchising Industry. The Chief Executive of the Council of Small Business Organisations in Australia, Mr Rob Bastian, described big business concerns about uncertainty as 'crap', pointing to the uncertainty which had previously confronted hundreds of thousands of small businesses.[38]

Press reports immediately prior to the Government finalising its response to the report suggested that the government had been subjected to heavy lobbying by several business groups strongly opposed to the Committee's proposals to adopt a new section 51AA banning unfair conduct. These included the Law Council, which was said to have claimed that the proposed unfair conduct test would lead to widespread uncertainty and litigation. The Treasury was reported to have strongly opposed the Committee's recommendations. The Department of Industry, Science and Technology is also believed to have opposed the recommendations.[39] On the other hand, the press indicated that there was strong support from Coalition backbenchers.[40] Interestingly, a significant proportion of the government's backbench had experience with small business. This was also the case with the government members of the Reid Committee, including Mr Reid and Mr Richard Evans, who had chaired the Committee for part of the Inquiry.[41]

On 11 July 1997, the Minister for Small Business, Mr Prosser, who was hostile to the Committee's recommendations, was forced to resign his portfolio, after weeks of political controversy. Mr Prosser had suggested that a voluntary code of conduct would be the best way of resolving disputes in the franchising sector.[42] Mr Prosser had also

ruled out tougher retail tenancy laws to protect retail tenants as recommended by the Committee. Mr Prosser's involvement in retail tenancy issues, while he himself was a major retail landlord, was widely condemned as a conflict of interest, in breach of the Ministerial Code of Conduct. Mr Prosser had also remained actively involved in the management of his own shopping centre interests. It was also reported that Mr Prosser's resignation headed off new allegations of a conflict of interest regarding involvement in petrol retailing while responsible for the Petroleum Retail Marketing Sites Act and the Petroleum Retail Marketing Franchise Act.[43] Mr Prosser was replaced by one of the government's most experienced and effective politicians, Mr Peter Reith, whose portfolio, Workplace Relations, acquired responsibility for small business matters. This represented a significant upgrading in the importance of the small business portfolio. Mr Reith was quoted as saying that;

> "I have no view for or against legislative change. . . . I will treat the issues on their merits."[44]

Thus, some compromise was foreshadowed. Mr Reith, in a *Meet the Press* interview on the Ten Network, reassured big business that the Government would not undermine Australia's system of contract law.[45] But he also claimed that the government would go a fair bit further than the Committee had proposed.

As is the normal practice, the Government responded to the Committee's report in a statement to the House of Representatives, *New Deal: Fair Deal – Giving Small Business a Fair Go*, by Mr Reith on 30 September 1997. As far as the rhetoric of the statement is concerned, the Minister said:

> "Make no mistake about it, this Federal Coalition Government, this Prime Minister, and this Minister, is pro-small business, and proud of it. . . This response on fair trading policy . . . is the strongest message ever sent from Canberra to Australia's small business community that they now have a national Government that has listened, has understood and has acted."[46]

The Minister's statement went on to claim that the Government had accepted the Committee's conclusions that concerns about unfair business conduct towards small business were justified, and should be addressed urgently. The Minister announced that the Government would act on the recommendations of each of the seven areas of reform

identified by the Committee – unfair conduct, retail tenancy, franchising, misuse of market power, small business finance, access to justice and education. Nevertheless, while claiming full credit, the Government did not implement the Committee's recommendations in full:

> "The Government has accepted the Committee's recommendations either in whole or in part, according to the constraints on Commonwealth powers and the importance of delivering a policy outcome that maximises the benefits to small businesses whilst minimising any counterproductive impacts on the sector.'[47]

The Minister said that, in a number of important respects, the Government response had gone further than the Committee's recommendations, particularly in the area of effective enforcement of fair trading issues by ACCC. In summary, the Government action involved:

- A new provision in the Trade Practices Act to give small business genuine access to protection against unconscionable conduct;
- A new provision which would allow industry-designed codes of practice, in whole or part, to be legally underpinned and made mandatory under the Trade Practices Act and enforced as breaches of that Act;
- A new provision which would allow the ACCC to take representative actions on behalf of small business for misuse of market power by big business;
- A new provision which would give small business interests equal importance to consumer interests when appointments are made to the ACCC; and
- A directive to the ACCC under the *Trade Practices Act 1974* requiring the ACCC to enforce small business legal rights against unfair business conduct. The Government also provided funding to enable test cases to be undertaken.

In respect to the first of these, the new provision extended the existing common law doctrine of unconscionability by mirroring the legal rights available to consumers under the existing Section 51AB and incorporating most of the matter included in the Committees proposed Clause 51AA. Importantly, however, the Government legislation persisted with the term 'unconscionable conduct' rather than 'unfair conduct as proposed by the Committee'. The Committee had recommended that the term 'unconscionable conduct' be replaced by a term without its limiting legal entailments and proposed the term 'unfair' as covering all the circumstances that would be covered

by the terms 'unconscionable', 'harsh' and 'oppressive'. The Government's Bill also dropped the terms 'harshness of the result' from the matters that the courts could take into account. Importantly also, the new provision was limited to transactions under $1 million and public–listed companies were excluded from instigating action under the provision. Perhaps the most important recommendation that survived the Government's consideration of the Reid Committee's proposals was the requirement that corporations covered by the section were effectively required to act in good faith.

While the Committee clearly recommended that the law should be extended to cover both procedural and substantive circumstances it is unclear as to the extent that the Government's legislation achieved that widening. Thus the Government's response, which, in other respects, was very much in the spirit of the Committee's recommendations, fudged the central issue in the inquiry, and limited the impact of any change to small transactions. Consequently, it will be necessary to await the reaction of the courts to the new clauses before it will be clear how extensive the change has been. It is also unclear how the courts will interpret the $1 million limitation and so the breadth of application of the new clauses is also subject to considerable uncertainty.

Again, big business response to the government's proposals were less than enthusiastic. For example, Mr Peter Verwer, Chief Executive of the Property Council of Australia, was quoted in the *Australian Financial Review* of 2 October 1997 suggesting that a number of issues regarding the proposed unconscionable conduct provisions required clarification. In particular, he suggested that:

> "the sanctity of contract could well be in jeopardy."[48]

In the same vain, the Chief Executive Officer of VECCI, Mr David Edwards, who had opposed legislation in his submission to the Inquiry, said that the government's action could be disastrous for all businesses.[49] Similarly, Professor Baxt, former Chairman of the Trade Practices Commission, claimed that the new provision would erode the law of contract and cause widespread uncertainty.[50] On the other hand, the ACT and Region Chamber of Commerce believed the package was a fair and just outcome for small traders.[51] The Victorian Minister for Small Business and Tourism said that the response signalled a major breakthrough for the protection of small business.[52]

Interestingly, Peter Switzer, Small Business Editor for *The Australian*,[53] in welcoming the proposals on 1 October 1997, pointed to the role of Mr Reith, newly responsible for small business matters, seeing him as riding to the Prime Minister's rescue at a time when the government was under pressure because of ministerial travel rorts. Michelle Grattan[54] pointed out that the Report had raised high expectation in the small business community, expectations that the government could not afford to disappoint. *The Australian Financial Review* in its editorial of 1 October 1997 had also pointed to Mr Reith's skill as a politician in crafting a package that got small business off the government's back, while avoiding an overly intrusive regulation of commercial relations. *The Australian Financial Review* was thankful that the government's response did not go as far as the 'often wacky' recommendations of the Report. Nevertheless, *The Australian Financial Review* was concerned that the new legislation would interfere in the commercial activities of the business sector and that the legislation would set a new attitude to regulation that could easily become heavy-handed.

In a subsequent academic article, Baxt and Mahemoff attacked the Government's legislation as eroding basic notions of contract law, though pointing out that it fell far short of the recommendations of the Reid Report.[55] They cite with approval a judgement of Lord Ackner in *Walner v Miles*:

> "[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoid making misrepresentations . . . A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party."[56]

Further, they believe that competition is, by its nature, harsh and ruthless. Of course, the claim as to impracticality of a good faith requirement cannot stand the empirical test, as Germany has had a strong formal duty of good faith in its civil code for a century, while the requirement is now well entrenched in United States law, including the Restatement of Contract.

Baxt and Mahemoff see the amendments to the Act as accelerating the widening of the remedies of unconscionability triggered by previous amendments and an even more adventurous set of courts. Thus, they see these developments as further encroaching on the certainty and sanctity of contract law, and creating an atmosphere where anything can be challenged. They believe that legislative enactments often provide considerable impetus to judicial activism. Indeed, they believe that since 1983 the High Court has greatly extended the scope of equitable doctrines in Australia, in what they see as a growing wave of 'intervention'. In particular, they refer to the 1997 decision of Batt J in *Olex Focas Pty Ltd v Skodaeexport Co Ltd* and of Branson J in *Pritchard v Racecage Pty Ltd* (1997) as opening the door to an expansive interpretation of the common law definition of unconscionability applying to commercial transactions in general. They believe that, while commercial law should encourage fair dealings,

> "it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable."[57]

This again invokes the positivist attempt to distinguish between law and morality. Their fear is that the list of considerations contained in section 51AC of the Act will also be used in practice in respect of section 51AA, and through this route extend to the common law. At the very least, it will be difficult for the courts to ignore the criteria. Of course, if that were the case, then the Reid Committee's recommendations for a general broadening of the equitable doctrine of unconscionability would have been achieved.

Since the 1997 amendments to the *Trade Practices Act 1974*, the ACCC has actively sought to bring actions in respect of unconscionable conduct to establish the body of case law sought by *Finding a Balance*. Discussion with the ACCC has led the author to the belief that the broad range of measures has significantly increased the regulatory constraint on unfair conduct, and is acting as a significant deterrent to such conduct. The ACCC has now commenced the first of such proceedings in respect of alleged unconscionable conduct by a company for taking advantage of its superior bargaining position when it demanded $70 000 in consideration for granting a new lease. A small business tenant had purchased a business occupying lease-hold premises with an option for a further term of seven years. While the landlord was aware of the lessee's intention to exercise that option, the tenant had failed to formally advise the landlord of that

intention until after the required date. Interestingly, the ACCC has joined the solicitor advising the company in the proceedings under Section 76 of the Act. Section 76 provides that when the court is satisfied that a person has aided and abetted contravention of the Act that person can be penalised as determined by the court. Section 76(1)(e) also permits the court to impose penalties where a person 'has been in any way directly or indirectly knowingly concerned in or party to the contravention by a person of such a provision'. This action suggests that the ACCC has also decided to take a hard line with legal advisers who are knowingly concerned in their client's unfair conduct in breach of the Act.

## CONCLUSION

What has been remarkable about the above debate has been its extraordinarily frequent use of the expert public inquiry as a means of deflecting political pressure for change.[58] This has been complemented by regular consultation processes on the outcomes of those inquiries. Nevertheless, throughout the debate the issues remained essentially the same, whether, and to what extent, the Commonwealth should legislate to regulate unfair conduct by big business towards small business. Similarly, the arguments used throughout changed in style only, not in content. The debate also exhibits the tendency for public policy to follow a path of incremental change, which the early Lindblom advocated as the best form of policy development.[59] It also exhibits the entrenched power of big business groups, that the less optimistic late Lindblom feared would forever provide a barrier to more radical change.[60] It is also unusual among contemporary policy debates in that, for the most part, it found big and small business lobby groups on different sides of the debate. Thus Governments had to chart a course through two powerful business lobbies, advancing two different conceptions of justice, neither of which governments wished to offend. Consequently, throughout the debate, Governments of both persuasions conceded as little to the pressure of small business groups as they could get away with at the time.

The debate also provides a good illustration of the entrenched power of economic methodologies and values as the dominant evaluative considerations used in contemporary policy debates. Thus, big business used the rhetoric of classical contract law, along with the contemporary economic rationalist rhetoric of minimum effective

regulation, as the means of deflecting the political pressure. For its part, Treasury responded with concerns about the impact of regulatory action on transaction costs throughout the economy. Small business responded with theoretical arguments to the effect that economic efficiency would be enhanced by legislation of the type they had proposed. What was disappointing from an economic point of view was a lack of any real attempt to evaluate the costs of unfair business conduct. Consequently, the debate remained throughout at the speculative level, except to the extent that the small business lobby made regular appeals to anecdotal evidence of the impact of such conduct on individuals and the ACCC reported frequent complaints.

What is also evident is that the debate cannot be settled on the basis of current moral theories based on individualistic premises that are incommensurable and incompatible. The debate can only be mediated by the political process. Indeed, it can be seen as part of a broader and basic political controversy that also is incapable of rational resolution on the basis of individualistic premises. This is the conflict between incompatible accounts of justice arising out of individualist entitlement theories of property rights such as advanced by Nozick in the tradition of Locke, and the equally individualistic accounts of just distribution advanced by Rawls.[61]

There is a particular irony about the closing phases of this debate as well. At a time when small business groups were strongly pressing for justice for small business in its dealings with large business, pointing in particular to oppressive terms and conditions of contractual arrangements, to the unilateral alterations of terms and conditions and to unfair terminations of long-term contractual arrangements, these very same lobby groups were also opposing unfair dismissal laws intended to protect employees from similar unfair conduct by small business employers. It brings to mind Nietzsche's complaint that the morality of European society had been nothing but a series of disguises for the will to power.[62] Another irony is that we are unable to come to terms about the meanings of the words, unconscionable and unfair, while being obliged to pretend that all legal words should have an objective and identifiable meaning available to all. Of course, most people will not have heard of the word 'unconscionable', let alone how the courts have used it in recent times. This stands in marked contrast to the word 'fair' which is used daily by everyone in our society.

This chapter has provided an account of the development of the doctrine of freedom of contract and charted some of its demise, most recently in the Australian Fair Trading debate. The account pointed to contract as a central concept and technique of the market system as well as a fundamental explanatory device used, in particular by economists, in talking about social order. That form of explanatory device arose following the breakdown of the ideas derived from Aristotle and Christianised by Acquinas and which justified the medieval social structure. In this world, the possession of property involved temporary custodianship and carried duties as well as rights, in particular, obligations regulating economic life to achieve fairness. The breakdown of these notions and the development of more absolute ideas of ownership were closely related. Locke's social contract ideas, with their Natural Law basis and their defence of property rights, served the interests of the propertied elite. This brought with it the realisation that judges made law rather than discovered it. These changes made it easier for the propertied elite to see society as based on a social contract, not on moral obligations backed by Divine law. These economic liberal ideas were also closely connected with the idea of the rule of law and development of commercial law. They also brought with them an erosion of the medieval concern for a just price and for just agreements and thus the decline of Equity. Contracts came to be seen as the creation of the wills of the parties, as private legislation, which the courts were obliged to uphold, however harsh the consequences.

This development of the doctrine of freedom of contract and the associated doctrine of *caveat emptor* was encouraged by legal thesis writers looking for fixed, certain principles on which the law should be based and on the 'scientific' accounts of the classical economists, and the promotion of *laissez faire* economic ideas by popular commentators and by Herbert Spencer in particular. These ideas were particularly influential in the United States, where the development of the doctrine of freedom of contract was closely linked with English legal doctrines. The rise of formalism within the law, the attempt to place law under the rubric of science and not morality, was closely linked with these developments. Taken together these developments gave rise to classical contract law, that body of legal doctrine that came to its full development towards the end of the nineteenth century. Social and political developments in both England and the United States rapidly led to the erosion of the practical significance of the doctrine as both countries erected all the machinery of a modern society. Curiously,

the vast body of legislation controlling trade and commerce that resulted was not seen as eroding the doctrine of contract so much as creating special bodies of law dealing with exceptions. Nevertheless, the last century has seen the gradual re-emergence in all common law countries of Equity that has eroded the more extreme affects of the rigid application of the doctrine of freedom of contract.

Classical contract law was, of course, applicable to Australia. And here in Australia, over the last twenty-five years, there has been an ongoing debate about Commonwealth regulatory action to control unfair business conduct towards consumers and small business operators. This debate centred around proposals to amend the *Trade Practices Act 1974*, the first effective general legislation at the Commonwealth level to control trade practices. Most of the proposals raised in that debate were specifically aimed at broadening, by statute, the Equitable doctrine of unconscionability, directly challenging classical contract law and the doctrine of freedom of contract. Since the enactment of the 1974 Act there have been at least nineteen major reports or legislative proposals dealing with proposals to amend the Act for that purpose. These culminated in the 1997 Reid Report and its major proposals to prohibit unfair business conduct, by significantly broadening the equitable doctrine of unconscionability. In response to that report the Government introduced Amendments of its own to the *Trade Practices Act 1974*. Though not as broad, these changes further erode classical contract law, authorising the courts to examine a broad range of factual issues in contract disputes involving small business, involving both procedural and substantive issues, in a way inconsistent with the classical law. While the courts are still to react to the new legislation, there is a strong possibility that these legislative provisions, and in particular the requirement to act in good faith will migrate to the common law.

The next chapter will tease out some of the issues raised by the above history and the conceptual matters that they raise.

## Notes

[1] Tawney, R H, *Religion and the Rise of Capitalism*, Pelican Books, 1926, 1938, pp252-253

[2] Commonwealth of Australia, Parliamentary Debates, Volume XXXI, 14 June 1906 p244

3 Mr Johnson, Member for Lang, 1906 Commonwealth of Australia, Parliamentary Debates, Volume XXXI, pp352 and 356

4 Commonwealth of Australia, Parliamentary Debates, Volume XXXI, 14 June 1906, p255

[5] Richardson, J E , 1967, Introduction to the Australian Trade Practices Act, Hicks Smith, Sydney

[6] Commonwealth of Australia, Parliamentary Debates, Vol H of R 46, 19 May 1965, pp1654-1656

[7] Richardson, 1967

[8] Report of the Trade Practices Act Review Committee (Swanson Committee), August, 1976, AGPS, Canberra

[9] Commonwealth of Australia, Parliamentary Debates, Senate, Vol S57, 27 September 1973, pp1013-1014

[10] Swanson Committee, 1976

[11] Statement of Basis and Purpose of Trade Practices Rule 408, cited Report of the House of Representatives Standing Committee on Industry, Science and Technology, 1997, p180

[12] Trade Practices Consultative Committee: Small business and the Trade Practices Act, December, 1979, AGPS, Canberra

[13] See for example Etzioni, 1988

[14] Minister for Home Affairs and Environment, and Minister for Employment and Industrial Relations, 1984, The Trade Practices Act Proposals for Change, AGPS, Canberra

[15] Act No 17 of 1986

[16] Commonwealth of Australia, Parliamentary Debates, H of R, Vol 147, 19 March 1986, p1623

[17] This claim is based on the author's experience of public policy debate within the bureaucracy at that time. The author attributes it in part to the growing dominance of Mr Keating as Treasurer within the Hawke Labor government, though it also reflects the desire of that government to appear economically and financially responsible following the perceived failure of the Whitlam Labor government, and the influence of economic rationalist ideas more generally throughout key areas of the Commonwealth public service.

[18] Personal knowledge

[19] Business Affairs Division of the Commonwealth Attorney-General's Department, 1986, Co-Operative Companies and Securities Scheme, Draft Franchise Agreement Bill and Second Draft Franchise Agreement Bill, AGPS, Canberra

[20] House of Representatives Standing Committee on Legal and Constitutional Affairs, 1989, Mergers, Monopolies: Profiting from Competition, Canberra

[21] Trade Practices Commission, 1989,Trade Practices Discussion Paper, TPC, Canberra

[22] Report of the House of Representatives Standing Committee on Industry, Science, and Technology, 1990, Small Business in Australia - Challenges, Problems and Opportunities, (Beddall Committee), Canberra

[23] Commonwealth of Australia, Parliamentary Debates, H of R, Weekly Hansard No 10, 13 November 1990, p3837

[24] Report by the Franchising Task Force to the Minister for Small Business and Customs, the Hon David Beddall MP, December 1991, DIST, Canberra

[25] Gardini, Robert, 1994, Review of the Franchising Code of Practice, October, DIST, Canberra

[26] Report by Working Party to the Minister for Small Business, Senator Schacht on the Need to Amend Section 51AA, 1995, DIST, Canberra

[27] Department of Industry Science and Technology,1995, Better Business Discussion Paper, DIST, Canberra

[28] Salmon J in Brusewitz v Brown [1923] NSWLR 1106 at p109 cited with approval by Brennan and Toohey JJ in Louth v Diprose (1992) 110 ALR 1, pp8-9

[29] This correspondence was made public in a media kit released by MTAA and other small business organisations on 29 May 1997.

[30] Report by the House of Representatives Standing Committee on Industry, Science and Technology, May 1997, Finding a balance Towards Fair Trading in Australia (Reid Report)

[31] House of Representatives Standing Committee on Industry, Science and Technology, Media Release, 1 July 1996, also cited piii Reid Report

[32] Statement by the Prime Minister, the Hon John Howard MP, 24 March 1997, More time for Business, AGPS, Canberra, piv

[33] The Pharmacy Guild of Australia, Media Release of 27 May 1997

[34] Access Economics, Tipping the Balance?, July 1997, Canberra

[35] Hughes, Anthony, Inquiry into retail tenants misguided, Sydney Morning Herald, 13 August 1997

[36] Report by the House of Representatives Standing Committee on Industry, Science and Technology, May 1997, p55

[37] McGuinness, P P, Sydney Morning Herald, 13 August 1997

[38] Abernethy, Mark, Full weight behind fair trading report, Australian Financial Review, 8 July 1997

[39] Personal knowledge

[40] Burton, Tom and Katharine Murphy, Govt considers compromise on unfair conduct, Australian Financial Review, 22 September 1997.

[41] Personal knowledge

[42] Bita, Natasha, A parliamentary inquiry has exposed rampant exploitation of small businesses, The Australian, 5 June 1997

[43] McKinnon, Michael, Oil groups cite petrol bias, Herald Sun, 14 July 1997

[44] Stott, Diane, Reith balancing on a legal fence, Sydney Morning Herald, 29 July 1997.

[45] Burton and Murphy, 1997

[46] Statement by the Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, New Deal: Fair Deal-Giving Small Business a fair Go, September1997, p1

[47] Reith, 1997, p1

[48] Hartley, Robert, Property Observed, Australian Financial Review, 2 October 1997

[49] Chamberlin, Paul, and Patrick Donovan, Canberra steps in to restrain the business bully-boys, The Age, 1 October 1997

[50] Reith's blueprint for change, The Australian Financial Review, 1 October 1997

[51] Clack, Peter, Small business to flex its new-found legal muscle, The Australian Financial Review, 2 October 1997

[52] Chamberlin and Donovan, 1997

[53] Switzer, Peter, Levelling the playing field, The Australian, 1 October 1997

[54] Grattan, Michelle, Small end of town wins, The Australian Financial Review, 1 October 1997

[55] Baxt, Robert, and Joel Mahemoff, 1998, Unconscionable Conduct Under the Trade Practices Act – An Unfair Response By the Government: A Preliminary View, Australian Business Law Review – Vol 26, February, pps5-24

[56] Baxt and Mahemoff, 1998, p5

[57] Baxt and Mahemoff, 1998, p17

[58] Use of inquiries to this extent in a particular debate is very unusual in the author's experience.

[59] Lindblom, C E, 1977, Politics and Markets, Basic Books , New York

[60] Lindblom, C E, 1982, The Market as Prison, The Journal of Politics, vol 44, no 2,

[61] MacIntyre, 1981

[62] Kaufmann, Walter, trans and ed, 1992, The Basic Writings of Nietzsche, Random House, London

# CHAPTER 7: THE CONCEPTUAL ISSUES RAISED BY THE AUSTRALIAN FAIR TRADING DEBATE

> *Justice . . . is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of human society . . . must in a moment crumble into atoms.*
> Adam Smith.[1]

## INTRODUCTION

As we have shown in Chapter 6, over the last twenty-five years there has been a vigorous policy debate at the Commonwealth level on the issue of fair trading which has been documented by a large number of public inquiries over the period. That debate arose out of ongoing complaints from the small business sector regarding the conduct of big business towards small business. This Australian Fair Trading debate continues a centuries old controversy over the role of the state in regulating transactions and particularly in enforcing contracts which are claimed to be unfair. Thus, this debate raises fundamental questions about the relationship between the state and the market system and between that market system and society more generally.

The Australian Competition and Consumer Commission (ACCC), the successor body to the Trade Practices Commission, and which administers the *Trade Practices Act 1974*, says that there are a number of common features in the complaints that they have received from small businesses in relation to their dealings with more powerful firms.[2] These also appear to be typical of the complaints that have arisen over the course of the entire debate:

- little or no ability to negotiate terms of the contract (often pro-forma 'take it or leave it' contracts are used);
- inadequate disclosure of relevant and important commercial information which the weaker party should be aware of before entering the transaction;

- inadequate and unclear disclosure of important terms of the contract, particularly those which are weighed against the weaker party. This can occur through:
  - the technical wording of the document;
  - the 'theatre' of the negotiations whereby the small business person is under-represented, lacks the legal fire power brought to the table by the other party, and is discouraged from considering the details of the contract, or is not given the opportunity to do so; and
  - the fact that the terms which can operate against the interests of the weaker party are not brought to the attention of that party, or their full import is not spelt out to that party;
- when smaller parties have committed themselves to a long term relationship, for example, through a lease or franchise, the dominant parties seek to vary the nature of the relationship so that it is more favourable to the dominant player and conversely, affects the viability of the weaker party; and
- when disputes do arise there is often no quick, cheap and market sensitive way of dealing with them and even where they do exist, there is a reluctance by small business to access any remedial action through fear of reprisal.

As has been noted in the account in Chapter 6, these common complaints can be characterised as resulting from asymmetries of power and information between the parties to these transactions. The debate, itself, has involved a number of key elements:

- A dominant evaluative methodology, based on the concept of 'economic efficiency' seen primarily in terms of Pareto-optimality;
- A reliance on and advocacy of the primacy of contract with its underlying unexamined assumption that it is proper for the state to enforce private agreements; and

- A reliance on a crude regulatory strategy articulated in terms of minimum effective regulation, based on a minimalist view of the role of the state derived from Locke.

These closely interrelated themes in turn rely on two hidden assumptions that have intruded into contemporary policy debates under the influence of contemporary economic discourse, the autonomy of the economic system and the primacy of the economic over the social. Consequently, the first and the last of the key elements, listed above, are very familiar themes in contemporary policy debates. The second, as we have already seen, is not new but arose out of the 'classical view' of contract law that developed in Britain and the United States in the nineteenth century under the influence of classical economists and positivist attitudes more generally. This classical view of contract is a feature of Common Law counties and was not fully shared by countries with a Civil Code tradition. Each of these themes will be dealt with in turn.

## ECONOMIC EFFICIENCY

There are numerous examples in the public inquiries documented in Chapter 5 referring to the concept of economic efficiency as the basis on which such public policy issues should be settled. Indeed, the debate has been conducted almost entirely under this rubric. For example, during the Blunt Committee Inquiry in 1979, in commenting on a proposal from the Law Council of Australia for a general prohibition of harsh, unconscionable or unfair conduct expressed the view that that the *Trade Practices Act 1974* was directed primarily at enhancing competition and should not deal with the 'moral' issues involved in business conduct.[3] This view was endorsed by the BCA in its submission to the recent Reid inquiry.[4]

The claim is, of course, unsustainable. It is a view that relies directly on the positivist separation of law and morals, a separation that is largely discredited. In the particular case, protecting competition, as the *Trade Practices Act 1974* does in some of its sections, is not an end in itself. It is done because of the belief that competition enhances economic outcomes and that in turn enhances human welfare. That is, it is done for a moral reason, economic efficiency being one of the intermediate moral values

served by that Act. Competition is also seen as producing fairer economic outcomes, as enhancing equity. Consequently, the competition provisions of the Act, themselves, are intended to enhance welfare and fairness. Conduct that directly reduces welfare or fairness can hardly be thought to be consistent with the aims of that Act. Indeed, even the Blunt Committee acknowledged that competition laws operate directly on business conduct and accepted that the Act's thrust against anti-competitive conduct was tempered to some extent to protect small business and to promote fairness.[5]
This should come as no surprise as this is what the Minister actually said when introducing the legislation in the first place. The Act was intended to both enhance competition and protect against unscrupulous conduct. More generally, and consistent with the account given in Chapter 2, the Law should not enforce anything but moral values.[6] The question, therefore, is not whether the law should enforce morality, but the extent to which it should do so.

The Blunt Committee went on to specifically define 'desirable economic performance', the words used in its terms of reference, in terms of 'economic efficiency', a concept which it took to be the equivalent of 'Pareto-optimality'. The Blunt Committee acknowledged, in a footnote only, some limitations of this concept, but its analysis remained unaffected by that acknowledgment, a deficiency shared by subsequent references to 'economic efficiency' throughout this debate, and recent public policy debate more generally.

Another fashionable economic perspective was that employed under the rubric of 'competition policy' by the *Better Business Conduct* Discussion Paper of 25 October 1995 by the Department of Industry, Science and Technology.[7] That Department relied on reasoning related to the 'contestability' of markets and 'economic ransom' to provide a justification for its proposed amendments of the *Trade Practices Act 1974* to outlaw 'harsh or oppressive' conduct within an existing commercial relationship. In this analysis, contestability is defined as the degree of ease with which firms can enter or leave an industry with a number of elements being necessary to secure *'perfect'* contestability. These include an absence of sunk costs; all firms being subject to the same conditions; and consumers being indifferent between markets. In a *'perfect'*

contestable market, a firm would not be able to impose harsh or oppressive terms on one another and firms would be able to leave an industry without significant economic penalty where the economic return is not in keeping with that firm's expectation. In reality, the conditions for perfect contestability cannot be met, and the Department argued that Government initiatives are sometimes necessary to improve contestability and restore choice in commercial relationships. The Department went on to point out that gaining an adequate return on sunk costs is important for small businesses, as they often use finance borrowed against the family home to enter a market. The sunk costs of a business then create a barrier to market exit which restricts their commercial flexibility and leaves them open to exploitation. The abuse of relative bargaining power, in such a way as to remove choice from a commercial arrangement from one party, impacts negatively on contestability. The Department concluded that the theory of contestability clearly establishes that situations of 'economic ransom' are a problem which requires attention. It is not clear that this form of analysis is anything other than a particular form of a more general economic efficiency argument based on Pareto-optimality, though some may argue that it is an attempt to come to grips with the 'workable competition' experienced in real markets, while avoiding the conceptual difficulties involved in the concept of competition. Of course, this is the same problem that the legal doctrine of economic duress was intended to deal with shorn of the limitations imposed upon it by classical contract law.

More recently still, the Reid Inquiry was charged with reporting particularly on whether certain commercial practices might lead to sub-optimal outcomes.[8] In its submission to that Inquiry, the Business Council of Australia (BCA), the premier business lobby group operating in Australia and representing Australia's largest companies, cited with approval the Blunt Committee's claims that it was inappropriate for the *Trade Practices Act 1974* to deal with moral issue and that the Act is primarily concerned with 'economic efficiency'.[9] As has already been explained, this flies in the face of explicit statements by the responsible ministers to the contrary.

There is some similarity between this BCA position and Posner's economic theory of the law, in which the law is seen as serving wealth maximisation.[10] But, of course, the

law to which he refers is judge-made law which he considers morally superior to statute law which tends to depart from his efficiency norm.[11] Posner's theory is, indeed, an extreme manifestation of the economic rationalism of the Chicago school. It is such a transparently impoverished account of justice, running in the face of our contemporary moral vocabulary, that it warrants little serious consideration. Thus, for Posner, suffering is irrelevant to his conception of justice unless it is accompanied by a capacity to pay. It equates justice with economic efficiency, but an economic efficiency which is defined purely in terms of wealth maximisation. It is clearly intended to be both a descriptive and a normative theory. It is a theory which attaches importance to freedom of choice, but only to the positive rights and values intrinsic to capitalism, the protection of private property rights, promise keeping, and freedom of contact, those rights and obligations that were also central to Locke's social contact theory.

The BCA submission mounts a more standard economic argument based on Pareto-optimality: that there should only be 'regulatory intervention' when 'economic efficiency' is lessened by distortions in a market, interventions which hinder the movement of resources to their most valuable and efficient use, and where the benefits of that intervention outweigh the costs. They go on to suggest that this calculus is one that should properly be performed by the Productivity Commission, the successor body to the Industry Commission, an organisation popularly believed to be committed to economic rationalism.

More generally, the Trade Practices Commission and its successor, the ACCC, have consistently argued that 'economic efficiency' would be enhanced by action directed against unconscionable conduct in commercial transactions. For example, in 1991 the Trade Practices Commission[12] advised the Attorney-General and the Minister for Small Business and Customs that there were net economic benefits to be gained from 'the regulation of' unconscionable conduct in commercial transactions where:

- there is an inequality of bargaining power;
- the weaker party suffers from an inability to protect its interests because of a special disability, a special relationship, or a lack of a practicable alternative; and

- the stronger party is sufficiently aware of the inability and uses its superior bargaining power to take advantage of the weaker party.

In its submission to the recent Reid Inquiry, the ACCC expresses a similar view in the following terms:

> "From an economic viewpoint, economic efficiency and consumer welfare are maximised when resources are allocated to those uses in which the value to the consumer is highest. However, the attainment of economic efficiency is affected by distortions in the market (such as misuse of market power and misleading information) which prevent or hinder the free movement of resources to their most valuable and efficient use. In other words, the market may fail in important respects. Measures such as those in the Trade Practices Act to lessen or remove the underlying market distortions are economically justifiable."[13]

The Treasury submission to the Reid Inquiry points to the important contribution that small business makes to the Australian Economy.[14] Thus, for Treasury, the claims that small businesses are not adequately protected against 'harsh or oppressive' conduct in their dealings with larger firms raised important policy issues requiring careful assessment. The Treasury goes on to argue that there are two primary reasons for government 'intervention': market failure; and equity/fairness. This use of the word 'intervention' is not neutral, however, as it implies an interference in the normal, or even the ideal, state of affairs, an interference that has to be justified. The implication is that the normal or ideal is an unregulated market. It carries with it the minimalist account of the role of the state derived from Locke, which is challenged by the critique of the Enlightenment and of rationalism recounted in Chapter 4. Of course, this use of the word 'intervention' is typical of contemporary policy debates. The belief that markets are autonomous lies at the heart of economic rationalism. But it is a view that cannot be sustained in this debate, in particular, which is about what laws are necessary for the proper operation of markets themselves. It also presupposes that an unregulated market could actually operate, that 'the Market' is autonomous, a view that has already been rejected. Of course, 'the Market' or 'markets', are, themselves, abstract categories with no tangible existence, the reified aggregation of all exchanges, or some, exchanges,

and thus subject to all the objections directed by economists at the category 'society'. Indeed, even the category 'economic exchanges', like all categories, is contestable.

The Treasury agreed that inadequate information, high transaction costs, and substantial market power may give rise to a 'market failure'. This 'failure' can result in efficient small businesses being discouraged from entering the market or being forced out of business, thereby producing a 'sub-optimal' allocation of the community's resources. These are the standard economic arguments used by small business and the ACCC to justify amendment to the *Trade Practices Act 1974* throughout the debate. They rely on the concept of Pareto-optimality. Treasury also acknowledged that unfair business conduct can also lead to other social costs, such as increased bankruptcies and social dislocation. It was concerned, however, that general legislative action to deal with these issues, and associated equity considerations, could have adverse consequences on business certainty and the competitive process.

In relation to the economic arguments, neither the relevant departments, nor the big business lobby, pay any serious attention to 'distributional' or equity issues. Thus, while in the Treasury case the existence of equity concerns is briefly acknowledged, they are not discussed. More broadly, the word justice is never uttered. The two departments with policy responsibility in this area at that time, Treasury and the Department of Industry, Science and Tourism mounted theoretical arguments about economic efficiency, and possible efficiency costs or benefits associated with any changes in the law, but devoted few words to the social implications of unfair conduct. If their submissions are any guide, they had done little or no empirical work on this aspect of the problem. Throughout this debate, and more generally, it appears that these Departments believed that in practice economic discourse only legitimises a concern with 'efficiency', and/or that their responsibilities for policy advice were restricted to a concern with 'economic efficiency' only.

There seems to be no recognition that, in practice, it is impossible to separate efficiency from distribution issues, however much economists like the conceptual distinction. In any event, that conceptual distinction relies heavily on the concept of consumer

sovereignty, and on individual preferences, and the concept of Pareto-optimality. The first of these is clearly an ideological commitment arising originally out of Locke's political philosophy with its commitment to individualism, 'natural' property rights and a minimalist state. The second is also tainted with a bias in favour of the existing distribution of income and property, a bias which we also see in Locke and the tradition he founded. It will be recalled from Chapters 4 and 5 that Locke's political philosophy, originally served as an ideological justification for Whig property owners in their struggle with the Stuart kings and in their subsequent defence of their property rights. An uncharitable observer might see it serving the same purpose in this contemporary policy debate.

In relation to those limitations, it is often argued that the concept of Pareto-optimality is of little or no practical use because of its refusal to make interpersonal comparisons, its individualistic and static basis, and its bias in favour of the existing distribution of wealth. The dependence of Pareto-optimality on the initial distribution of income and wealth means that it cannot provide a neutral measure of welfare improvement. At best it is a minimum condition for a social optimum, but even that is open to damaging challenge. In any event, it relies on assumptions which are not realisable in practice. This also is well recognised, but ignored in actual policy debates. The attainment of Pareto-optimality requires the simultaneous fulfilment of all the optimum conditions, conditions that cannot be satisfied in real circumstances. But if only one of the conditions is not satisfied the model provides no guidance for action. Thus it is not possible to derive a 'second best' system from the perfect competition model.

As indicated above, underlying the Blunt Committee's concerns, and the Treasury's recent reluctance to endorse action to deal with unfair trading, is the fear that such action will damage the 'competitive process'. But they seem to have little understanding of how closely related the two concerns are. Their fear reflects an inability to distinguish between hard bargaining over the distribution of the economic surplus arising from an ongoing economic relationship, or a transaction, and competition. This, in turn, reflects a commitment to a dichotomous form of thinking in which it is necessary to classify conduct as either cooperative or competitive, but not

both. This choice of vocabulary is not neutral, but reflects underlying preconceptions, particularly a faith in competitive market processes. Having decided, without discussion, that the category 'competition' should be applied to these situations, a number of submissions to the Reid Inquiry went on to cite the judgement of Chief Justice Mason and Justice Wilson of the High Court in *Queensland Wire Industries v BHP* (1989):

> "Competition is by its very nature deliberate and ruthless. Competitors jockey for sales, the more effective injuring the less effective by taking sales away."[15]

This claim is, itself, open to contention because the damage that arises out of competition should be seen as the unavoidable side effect of a striving for excellence in the service of customers, not its primary purpose. The implication that big business seeks to draw is that, if it is permissible to damage competitors, then it is permissible to damage business partners. But, in fact, governments place severe limits on the ability of firms and individuals to injure each other in direct economic competition. They do it in order to protect firms from forms of competition that are considered unacceptable. The do it in order to protect competition, itself, as well as for other reasons. Thus violence, theft and fraud in economic competition are illegal, as are most attempts to monopolise a market, either individually, or in collusion with others. But, in any event, it does not seem reasonable to classify the bargaining between business partners, or even transaction partners, simply as competition in the sense in which that word is usually used. This vocabulary seems inadequate for the task being set it.

Briefly, competitive pressure, the attempt to maintain market share and profitability in the face of the offerings of rival firms, is seen in the economic literature as allowing performance comparisons, increasing incentives for firms to avoid inefficiency. However, not all forms of competition are seen as being desirable, nor are all forms of monopoly seen as being undesirable. Indeed, all real market situations are both competitive and monopolistic to some degree. The problem is to decide what degrees, and modes of competition are desirable; and to what extent monopoly is acceptable.[16] Economic theory seems to have some considerable difficulty in sorting out the difference. As John Vickers says:

> "Despite the widespread view, which has considerable empirical support, that competition is important for productive efficiency, it is not so obvious why. Competition seems very well in practice, but it is not so clear how it works in theory."[17]

The perfect competition model has little to say about productive and dynamic efficiency, though they may be more important than allocative efficiency. These different economic views potentially have significantly different policy implications. In any event, the very idea of 'perfect competition' seems to be incoherent – it presupposes the existence of social order, while postulating a perfect state of economic conflict, conditions in which no such order could be possible. It is effectively Hobbes's war of all on all, where no commerce would be possible.

Consistent with the account given in Chapter 3, Etzioni[18] emphasises that the competition experienced in practice is a sub-system nestled within a more encompassing societal context and is not self-sustaining. Rather the existence of competition and the scope of transactions organised by it, are dependent on what he calls the societal capsule within which it takes place. This is consistent with the earlier argument that self-interest alone does not provide an adequate basis for our social order. The pursuit of self-interest alone by real economic actors does not, and will not, produce a peaceful society. It is our moral codes combined with legal rules and penalties which prevents our conflicting interests from escalating to the point of self-destruction. Thus these moral and legal constraints are an essential precondition for competition to operate to increase welfare.

In Chapter 3, attention was directed in particular to the role of trust in promoting social and economic interaction. But in the language of neo-classical economics, trust and similar values, loyalty or truthfulness are called 'externalities'.[19] The very language seems to marginalise their importance even though technically they are only called 'externalities' because they are external to the price system, those areas in which the price system fails to operate. In a climate where the importance of 'externalities' is discounted, there is a danger that the importance of those moral values will be forgotten. This is particularly relevant to contracts in contemporary society which rely on informal

constraints to ensure that parties will act honourably when unforseen circumstances arise during the course of contracts which, in practice, are necessarily incomplete.

The dangers associated with a transaction depend not only with the nature of that transaction, but also with the trading environment of which it is a part. Consequently, opportunistic behaviour on the part of one party to a transaction or a contract can increase risks attached to all transactions and thus the costs of doing business generally. Consequently, the moral and legal sanctions which reduce opportunistic conduct also reduce transaction costs generally. In particular, they can have the effect of infusing trading confidence into transactions that are characterised by costly information and power asymmetries. Moral standards and a complementary legal framework provide infrastructure fundamental to the 'efficiency' of the market system - our moral and legal institutions are an essential part of the capital of the economic system. Indeed, as Arrow has noted, a lack of mutual trust is among the properties of many societies whose economic development is backward. This argument runs directly to the Treasury argument that unfair trading laws may raise transaction costs generally.

Such social demands may be expressed through the internalised demands of conscience or they may be embodied in formal legal rules. Indeed, the reliance on the more informal demands of conscience may well have efficiency benefits in some situations because of their adaptability to different circumstances. The calculativeness involved in the application of rigid rules could well be dysfunctional if cooperative attitudes, with their positive spillover effects, are undermined. It follows that an exploitive business culture is likely to be less efficient than one in which there is a greater degree of 'give and take'. Indeed, a number of specific studies have looked at the role played by social convention in helping to sustain collaborative relationships, even where recourse to the courts might have been preferred. In particular, Stewart Macauley researched non-contractual relations in manufacturing industry in Wisconsin in 1963.[20] He found that businesspeople often prefer to rely on a person's word in a letter, a handshake, or common honesty and decency, even when the transaction involves exposure to serious risks, rather than seek professional legal advice and protect themselves with a tightly worded contract. Indeed, Macauley discovered that in some cases, business people

considered that recourse to legalism in relationship-building indicated a lack of trust turning a cooperative venture into an antagonistic horse trade. Any weakening of the social and moral sanctions promoting such give and take may well increase the need for the codification of such standards through law.

The potential exists for significant conflict between the internalised social demands of conscience and the social demands expressed through formal legal rules, particularly in a litigious culture. Lacking extensive experience of the rigid application of the formal rules of the contract law, inexperienced small business operators are likely to expect that the standards of conscience will govern, or at least moderate, the business relationships they enter into. Further complicating this situation is the likelihood that unscrupulous businesses will exploit these expectations in contract negotiations, so as to impose harsh contract terms. And, of course, unscrupulous businesses have been known to lie about their intentions in order to obtain the agreement of the other party.

Competition must therefore always remain bounded. The question that then has to be decided is to what extent? No decision seems possible on the basis of the theoretical economic analysis available. Rather, it appears to be an economic issue that can only be answered by experience, by experimentation. But economic categories do not adequately cover all the possible issues. Some forms of behaviour are simply considered wrong, regardless of the consequences. This view flies in the face of the moral claims made for the market by economic rationalists.

What is clear in all the discussion about competition is that competition is not valued as a goal in and of itself, as a form of social Darwinism in which economic might is right. Rather, competition is valued as an instrument promoting social welfare.[21] As the Hilmer Report, a report that has been taken as the gospel of competition policy in Australia in recent years, says:

> "Competition policy is not about the pursuit of competition per se, rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives."

The problem is that the extent to which, and the way in which, competition promotes that welfare remains problematic. The danger is that we will slip all too readily into a form of social Darwinism deriving from Spencer where anything goes. It is that sentiment which seems, to some extent, to be reflected in the extract from the High Court judgement cited above.[22] Thus it is argued that such 'competition' as is permitted is the servant of our fundamental social values, not the determinant of our values. In particular, it is those fundamental values which define what is meant by social welfare. Consequently, such fundamental values as fairness or justice in social relationships are not to be conditioned by more instrumental values like competition.

What has also escaped comment in this somewhat impoverished debate is the fact that the effective operation of the market system relies on the coordination of activities every bit as much as it does on competition. That coordination necessarily involves cooperation, though coordination may also involve some coercion. It is also quite clear that the competitive provisions of the *Trade Practices Act 1974* set out to control the acquisition, extension and abuse of market power. There appears to be no good reason why it should not also seek to control the abuse of power in the coordination of activities as well. Indeed, in a liberal state, with its strong tradition opposing the abuse of governmental coercion, it would seem to be inconsistent and unreasonable not to be equally concerned about the abuse of government coercive power through the vehicle of contract law.

It is curious that in the current deregulatory environment none of the submissions from big business groups to the current Fair Trading Inquiry have attempted a positive justification of the status quo, that is, the continued application of state coercive power in support of the institution of contract. On the contrary it is small business groups who are seen as demanding government regulation, as having to justify that demand. In reality, of course, it is the small business groups who have been arguing for a selective deregulation of contract in arguing that in certain limited circumstances contracts should not be enforceable by the state. It is big business groups, some lawyers and the

Treasury that have been arguing for the continued use of the coercive powers of the state in support of certain business interests.

## PRIMACY OF CONTRACT

Chapter 5 has already provided an extensive discussion of the doctrine of freedom of contract. It was shown that it rose out of the Enlightenment program, and its associated political theorising, and came to prominence in the nineteenth century as the central doctrine of classical contract law. It has also been shown that the doctrine replaced an earlier concern with fairness in contractual arrangements, and transactions more generally, with a mechanical decision rule modelled on the same sort of individualistic and Newtonian principles that are used in neo-classical economics. It has also been recounted that this positivist view of contract law and of its central doctrine cannot be sustained. Indeed, the influence of the doctrine has now been in decline for over a century. Nevertheless, it remains an important value in contemporary capitalist society. Or rather, the values that lay behind the doctrine, remain important. What has changed is not that the freedom of individuals to enter into transactions and contracts is less important, but that it has been recognised that, in practice, there are many barriers to individuals exercising that freedom. In these circumstances, the high sounding principle of freedom of contract can all too readily become a cloak for the exploitive conduct of the powerful.

In any event, the common law, equity and the *Trade Practices Act 1974*, and a very wide range of other laws now constrain what can be contracted and by whom. And following the amendments to the *Trade Practices Act 1974* enacted in 1997, these constraints have been strengthened. In this context, the idea of a 'right to contract' independent of the social purposes of contract and of the surrounding law seems to be incoherent. As Jevons argued in a similar context:[23]

> "The first step must be to rid our minds of the ideas that there are such things in social matters as abstract rights, absolute principles, indefeasible laws, inalterable rules, or anything whatever of an eternal and inflexible nature."

Contract is not an institution existing independently of law, and of society and its values. In effect what small business groups have been arguing is that collective coercion should not be used to enforce conduct, including contractual terms, which offends against collective values. And this is a position with which the Reid Committee and ultimately the Australian government, albeit with some reluctance, agreed. And in so doing they appear to have brought the law of contracts in Australia more into line with the community's values.

Nevertheless, the keeping of promises is one of those community values, but it is not a value that has been shown, or could be shown, a priori, to warrant priority. Importantly, it has also been argued that far from undermining the institution of contract and economic exchange, any law which insisted on standards of fairness in contracts would be protecting the fundamental purposes of those institutions. As Angelo and Ellinger[24] say:

> "It is ironic that during the last decades of the nineteenth century and into the twentieth century, the concept of 'freedom of contract', which originally was used to invalidate contracts made without the parties' freely given consent, became the very tool used to establish the sanctity of standard form contracts."

In this same regard, Professor Terry[25] has argued that US experience with Section 2 302 of the Uniform Commercial Code, the doctrine of unconscionability can strengthen the ability to co-determine the terms of a contract that is implied by the concept of 'freedom of contract'. The courts may examine unbargained terms without disturbing those terms that have been co-determined.

## Uncertainty

As was shown in Chapter 6 the issues of uncertainty in commercial arrangements was also raised as a significant objection over the years to proposals for stronger unfair trading legislation. This focus on uncertainty is reflected in the terms of reference for the Reid Inquiry:

> "4. In developing options, the Committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimising

> the regulatory burden on business, and keep litigation and costs to a minimum."[26]

Indeed, the reference to the certainty in the market place, one of the key justifications of classical contract law is so plain that a cynic might be tempted to conclude that it was included in the terms of reference of that Inquiry to pre-empt the outcome of the inquiry.

As shown in chapter 5, the issue of uncertainty has been closely associated with the doctrine of freedom of contract. As was explained in Chapter 4, this demand for certainty is a theme also closely associated with the whole Enlightenment project. In the case of the Fair Trading debate, the BCA, for example, in its evidence to the Reid Inquiry was concerned that the existence of a harsh and oppressive provision could be used to overturn contracts that should otherwise be enforceable and that would produce uncertainty about the enforcement of contracts.[27]

This concern has been shown in Chapter 5 to confuse certainty with generality. The assertion that such generality leads to certainty is simply not true. What it does do in our legal system, however, is provide large businesses with a powerful advantage in enforcing contractual provisions. The cost and the practical difficulties of providing adequate evidence acts strongly against small business in any litigation. While big business makes much of the need for certainty in contracts, in practice many contracts in franchising, in retail tenancy, and in commerce more generally, provide the weaker party with little certainty about the environment they will be facing. Indeed, they usually provide the stronger party with wide discretions. For example, franchising contracts typically impose very heavy obligations on franchisees while leaving franchisor's duties relatively undefined. But the obligations of the franchisor are vital to the franchising relationship.[28] Such contracts and the franchisors' sunk costs necessarily involve the danger of opportunistic abuse. Retail tenancy contracts involve similar onerous terms and similar risks.

The widespread existence of such contracts must surely undermine any simplistic assertion that inexperienced small business people, entering into such contracts, are engaged in a process of rationally allocating the risks associated with the future of those

relationships. Indeed, even risk is the wrong word, what is really entailed is uncertainty. Big business frequently deals with the uncertainty associated with their economic relationships with small business by exploiting their bargaining power to retain freedom of action for themselves, while heavily constraining the discretion available to their small business partners. It also seems likely that many small businesses do not really understand that the resulting harsh contract terms will, in fact, be enforced against them. It appears possible that in many instances such businesses rely on oral assurances to the contrary. In these circumstances there needs to be a sounder theoretical description of contractual relationships than provided by the neo-classical view.

In this regard, Williamson tells us that transaction cost economics subscribes to the idea of the American legal realist Karl Llewellan of contract as a framework. According to Llewellan, a contract between two parties:

> "almost never accurately indicates real working relations, but . . . affords a rough indication around which such relations vary, an occasional guide in case of doubt, and a norm of ultimate appeal when the relations cease in fact to work."[29]

Transaction cost economics seeks to identify, explain, and mitigate contractual hazards. All those hazards can be attributed to the twin behavioural assumptions from which transaction cost economics works, bounded rationality and opportunism. Williamson argues that all complex contracts are unavoidably incomplete and where bilateral dependency exists are fraught with what he calls maladaption hazard. For Williamson, an important lesson for the study of economic organisation is that transactions that are subject to ex-post opportunism will benefit if appropriate safeguards can be devised in anticipation. Incentives may be realigned or superior governance structures within which to organise transactions may be devised. This is, of course, a position similar to that advocated by MacNeil.[30]

At a more empirical level, those who favour such changes argue that experience in NSW and in the USA support the proposition that undue uncertainty will not be caused. For example, Mr Frank Zumbo, an academic lawyer, submitted to the Reid Inquiry that a general provision in the *Trade Practices Act 1974* prohibiting unconscionable, harsh or oppressive conduct would not have the effect of undermining freely and openly

negotiated contracts.[31] He argues that a provision giving the courts a considerable degree of discretion should not be feared as the courts are likely to be careful in applying such a broad remedial provision, particularly given the legal precedents already established. Mr Zumbo refers in particular to experience with the NSW *Industrial Relations Act 1991*[32] which gives the Industrial Court of NSW the power to deal with particular types of unfair or harsh and unconscionable conduct. Professor Andrew Terry, Director, Centre for Franchising Studies at the University of NSW, similarly argued that there is no reason to believe that the power to address 'harsh or oppressive' conduct would not be handled responsibly and with less threat to certainty in commercial activities than may be feared. Professor Terry also pointed out that Australian judges were already applying broad standards to commercial behaviour. In particular, section 52 the *Trade Practices Act 1974*, which prohibits, in broad and general terms, 'misleading or deceptive conduct', conferred a massive jurisdiction that had been applied responsibly. While the term 'misleading or deceptive' could not be comprehensively defined, a wide body of jurisprudence had developed, which had accommodated higher standards of commercial morality without handicapping commercial reality. He also suggests that an approach which provides criteria for the courts when assessing such matters would also reduce uncertainty. Similarly, experience in Germany and the United States had demonstrated that a general doctrine of unconscionability does not introduce uncertainty into the law of contracts. Courts in both jurisdictions have been cautious in applying these unconscionability doctrines. What they have tended to do is to compare the terms of transactions being challenged, with the terms of similar transactions.[33] The recent amendments to the *Trade Practices Act 1974* will allow similar comparisons in Australia for small business transactions.

In any event, the Reid Inquiry, and the subsequent Government legislation, has provided mechanisms for businesses in conjunction with the ACCC to codify the types of conduct that are appropriate to particular sectors through Industry Codes of Practice. These are processes that enable interest groups to negotiate what are in effect standard terms and conditions that will be applied in particular areas of business. Thus it represents a step away from the individualistic basis of contract formulation, that was the nineteenth century ideal, indeed the Lockean ideal, to a more corporatist approach.

## Regulatory Strategy

It has been argued [34] that legislating to require that commercial conduct including contracts meet standards of fairness involves the Court in the application of value judgements and that involvement is undesirable. Of course, this view cannot survive the analysis provided before. There are no value free legal rules. Nevertheless, it is argued that a rule has advantages compared to a standard of fairness in that it promotes consistency, predictability and uniformity in decision making. Of course, this reflects the general orientation in moral philosophy since the Enlightenment, where God was conceived of as a rule giver. It also reflects the orientation of classical contract law.

This opens up a debate about whether such a rule can be defended as just in the face of evidence that the only possible rule - that contracts will always be enforced - has already been found wanting. People like Rawls are engaged in such a debate. The focus on procedural issues within the equitable doctrine of unconscionability is, itself, an attempt to maintain such a rule-based approach. Space does not allow the further exploration of this issue in detail. However, the value of this type of theorising has been strongly attacked in Chapter 5. In any event, the only reason the courts focus on procedural issues in practice has been to provide a pretext for them to decline to enforce contracts that were seen to be unjust on other grounds.[35]

This focus on rules that are easily enforced seems to be influenced by the neo-classical view of contracts and the search for mechanical decision rules. At the same time, it seems to involve a simplistic understanding of regulatory strategy. In particular, it seems to assume that such a rule is, in practice, enforceable. Yet one of the major themes in the Reid Inquiry was that small business cannot afford access to the courts (particularly given the long pockets and delaying tactics employed by big business), and, in any event, the fact that they are often involved in an ongoing relationship with the company with whom they are in dispute precludes them from undertaking litigation to enforce contractual rights. The point was made particularly strongly at a public

hearing in Canberra on Monday 4 November 1996, by the Deputy Chairman of the ACCC:

> "It has been our profound view, ever since we first started consideration of business-to-business conduct and small business-big business difficulties, that to imagine that simply a clause in the law would fix those problems is just looking in the wrong place. So in our submission to this inquiry, in our submission right back to the Swanson Committee in the 1970s, the Commission has been of the view that what is required is an overall new approach to the resolution of disputes between small and large businesses. . . .
>
> "But, in my view, it is a cruel hoax to give people a legal provision that is not enforceable. By enforceable, I do not just mean that there is a legal right but that there is some real capacity to be able to use it.
>
> "It only takes a moment's thought to see that for any small business, if it has some continued dealing with a large business, the idea of litigation is just not relevant. That is only after a business relationship has ended and you are trying to sweep up the pieces."[36]

In this context, the idea of minimum and effective regulation might be said to be mutually inconsistent. The ACCC itself proposed a regulatory strategy described in terms of an enforcement pyramid involving four stages:

1. adequate and clear information disclosure (the base of the pyramid);
2. early intervention when disputes arise (moving up the pyramid);
3. private enforcement (towards the top of the pyramid); and
4. public enforcement (at the top of the pyramid).[37]

It is a suggestion that seems to have been influenced by Braithwaite's views.[38] He has argued that we need institutions that give people and organisations the space to be virtuous, that nurture rather than destroy civic virtue in the business community. This needs to be backed up by tough-minded regulatory bodies that can shift to a hard headed approach on the occasions when this is considered to be necessary to enforce the values and goals of legislation. Consequently, he argues for a regulatory approach that firstly

attempts to solve problems by persuasion and dialogue and which presume good faith on the part of business. When such an approach fails then the regulatory response should escalate to threats designed to deter the conduct. But such an approach depends ultimately on a comprehensive suite of regulatory powers to ensure a high level of voluntary compliance. Only time will tell whether the amendments to the *Trade Practices Act 1974*, judicial activism to extend the application of those provisions more broadly, and moves to reduce the costs of litigation, combined with a more active ACCC role, will induce that voluntary compliance. It if does so, then in the view of the author, Justice will be served. For those who believe in a view of justice based on classical contract law, the view advanced unconsciously by economic rationalism, then Justice will not be so served. Herein lies the political and moral choice involved throughout this debate.

## Notes

[1] Smith, Adam, 1976, The Theory of Moral Sentiments, Raphael and Macfie, Oxford, p86

[2] Reid Inquiry, 1997, *Submission* No 62, pp 5-6

[3] Trade Practices Consultative Committee: *Small business and the Trade Practices Act*, December, 1979, AGPS, Canberra. In the event the Committee considered that a law prohibiting "unfair" business conduct as going further and not being compatible with the provisions of Part IV of the Act. However, the Committee felt there was great merit in exposing the proposal to debate and discussion and considered it a worthwhile area for the Government to keep under active examination.

[4] Business Council of Australia, 1997, Submission No 119, Reid Inquiry

[5] Blunt Committee, 1979

[6] Downie, 1972

[7] Department of Industry, Science and Technology, 1995, *Better Business Conduct*, Discussion Paper,

[8] Reid Report, 1997

[9] BCA, 1997

[10] Posner, Richard, 1981, The Economics of Justice, Harvard University Press, Cambridge Mass.

[11] Campbell, Tom, 1988, Macmillan Education, London

[12] Trade Practices Commission, 1991, *Unconscionable Conduct and the Trade Practices Act*, Possible extension to cover commercial transactions, Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, Trade Practices Commission, Canberra

[13] Reid Inquiry, *Submission No 62*, p6

[14] Reid Inquiry, *Submission No 168*

[15] see for example Reid Inquiry, *Submission No 62*

[16] Hunter, A, 1966, *Competition and the Law*, George Allen & Unwin Ltd, London

[17] Vickers, J, 1995, *Concepts of Competition*, Oxford Economic Papers 47

[18] Etzioni, 1988

[19] Arrow, Kenneth J, *The Limits of Organization*, WW Norton & Company, New York, 1974.

[20] Macaulay, Stewart, 1963, Non-Contractual Relations in Business: A Preliminary Study, American Sociological Review 28 (1) 55-67

[21] *National Competition Policy*, 1993, Report by the Independent Committee of Inquiry, pxvi

*Efficiency is a fundamental objective of competition policy because of the role it plays in enhancing community welfare*, Treasury Submission to the National Competition Policy Review, Treasury Economic Paper Number 16, 1993, p3

[22] It should be noted, however, that the full decision in the Queensland Wire case does not reflect such social Darwinism.

[23] Jevons, W S, The State in Relation to Labour, cited Atiyah, P S, The Rise and Fall of Freedom of Contract, Clarendon Press, Oxford, 1979, p615, citing T W Hutchinson, 1953, A Review of Economic Doctrines 1870-1919, Oxford University Press, Oxford

[24] Angelo, A H, and E P Ellinger, Unconscionable Contracts: A comparative Study of the Approaches in England, France, Germany, and the United States, Loyola of Los Angeles International and Comparative Law Journal, volume 14, Reid Report Exhibit No 180, Submission No 119,

[25] Reid Report, 1977, Exhibit No 13,

[26] Reid Report, 1997, piii

[27] BCA, 1997

[28] Hadfield, Gillian K, 1990, Problematic Relations: Franchising and the Law of Incomplete Contracts, Stanford Law Review, Vol 42, No 4, p927

[29] Williamson, Oliver E, The mechanisms of Governance, Oxford University Press, New York, 1996, p10

[30] Macneil,Ian R, 1980, The New Social Contract, Yale University Press, New Haven

[31] Reid Report, Submission No 15

[32] Reid Report, Exhibit No 13

[33] Angelo, and Ellinger, 1979

[34] Reid Report, Exhibit No 165, Submission No 159

[35] Atiyah, 1979

[36] Allan Asher, Deputy Chairman, ACCC, Reid Inquiry, Public hearing in Canberra on 4 November 1996. Transcript of evidence, pp374-75.

[37] Reid Report, Submission No 62

[38] Braithwaite, John, 1993, Responsive Business Regulatory Institutions, in C A J, Coady and C J G, Sampford, eds, Business, Ethics and the Law, The Federation Press, Leichhardt

# CHAPTER 8: SOME REFLECTIONS

> *Man's fate will forever elude the attempts of his intellect to understand it. . . The quest for the laws which will explain the riddle of human behavior leads us not towards the truth but towards the illusion of certainty, which is our curse.*
> Grant Gilmore[1]

## REITERATION

This thesis has, like Gilmore cited above, been highly critical of the abstract impersonal values, the universal solutions and the logical imperatives within the classical law of contract.[2] Human laws should not be seen as mystical absolutes but as tentative and imperfect social constructs, open to change. The development of the classical law of contract cannot be understood independently of its social and historical context, and of the tradition of thought of which it formed a part.[3] Thus, the rise and the subsequent fall in the doctrine of freedom of contract, which was recounted in Chapter 5, has much to do with the rise and the subsequent disintegration in the nineteenth century concept of explanation in the natural and social sciences.

But this is the critique of modernism more generally, a critique which should be familiar from Chapter 4. Nineteenth century social theory, in the tradition of Descartes, Hobbes and Locke, sought to find general laws of society modelled on the natural sciences, just as Spencer and Marx and numerous others sought to find general laws of history and social progress. Thus, classical contract law in its fully mature state, as developed in Langdell's casebook of contract law towards the end of the nineteenth century, was an abstraction from which all the particularities of person and subject had been removed.[4] Indeed, for theorists like Landell, law was a science and his casebook was an attempt to select and classify all the important contract cases ever decided, and to determine what he thought to be the small number of logically consistent, and self-contained principles and doctrines that lay beneath those cases. For classical contract law, there was only one, true, universal and unchanging rule of law, what Gilmore[5] calls a 'mystical

absolute' or a 'logicians dream of heaven'. As has already made clear in chapter 5, this view of contract law had a close intellectual and historical relationship with the free market of classical and neo-classical economic theory.

This 'positive' tendency of nineteenth century law, and of social science, had its origins in the Enlightenment project, a renaissance in the nineteen twenties and thirties and persists in economics to this day. But elsewhere, as Horwitz, Rorty, Toulmin and others tell us, belief in the possibility of general laws capable of making explanatory or predictive statements in the social sciences has plummeted.

> "The result has been a dramatic turn towards highly specific 'thick description' in which narrative and stories purport to substitute for traditional general theories."[6]

Thus, we should be wary of the seductions of grand theories, and sacred rules, which have little connection to reality.

In Chapter 4, the separation between fact and value as the basis for a value-free social science was seriously challenged along with the more privileged epistemological status of scientific reasoning. This challenge has been associated with a growing understanding of the contingency of the categories, and frames of reference, employed in the social sciences, along with a growing awareness that knowledge, itself, is socially constructed. There has been a growing understanding of the world as complex, multi-factored and interdependent. This, in turn, has led to a loss of faith in the single-factor chains of causation that were embedded in most nineteenth century explanatory theories.[7]

This critique also points to the collapse of the philosophical dualisms that have characterised all forms of theoretical debate since the Enlightenment. The representative schemes of our language cannot sustain these efforts to formulate categories which are mutually exclusive and final. This insight led, for example, to Dewey's refusal to accept a deep chasm between 'principled' and 'results-oriented' ethics and jurisprudence, and to neo-pragmatism's rejection of the choice between deontological and utilitarian moral theory.[8] Indeed, these developments have tended to

undermine the hope of finding rational ethical foundations for our social, political and economic arrangements, and, with it, the special right of philosophers to preach about those arrangements. For Dewey, James and Peirce, truth

> "was not to be found in the abstract logic of ideas, but in their practical consequences. There were no absolute or *a priori* truths, only workable and unworkable hypotheses."[9]

The very idea that human reason could discover immutable metaphysical principles that could explain the true nature of reality is an illusion. This, of course, undermines faith in all forms of dogmatism, and dogmatic explanatory schemes, including absolute property rights, absolute human rights, absolute markets and absolute rules more generally.

Among American legal theorists of the Progressive and Realist schools, the challenge to nineteenth century legal orthodoxy, with its scientific pretensions rooted in natural rights, individualism and absolute property rights, involved a fundamental re-examination of the idea of a rule of law independent of politics and the idea of:

> "[a] self-regulating, competitive market economy presided over by a neutral, impartial, and decentralized 'night-watchman' state . . ." Classical legal thought and contract law was "neither neutral, nor necessary, but was instead a historically contingent and socially created system of thought."[10]

This attack questioned the dichotomy between the state and the market, between ends and means, between procedure and substance and between public and private law. The latter dichotomy was a central feature of classical contract thought, with its will theory of contract. Thus, it came to be recognised that the institution of contract was, itself, subordinate to social and political goals. The market, property rights, and the law more generally were social creations, the products of social and political struggle. Importantly, there was no privileged category of economic relations that could be regarded as voluntary.[11] Rather, property was a delegation of coercive state power to individuals, while the market was an organised form of coercion of the weak by the strong. Indeed, the Lockean idea of natural property rights helped to disguise the coercive nature of these institutions. Since there was no such thing as a completely voluntary market, there could be no completely neutral market because rules were

needed to regulate that coercion. Of particular relevance to this thesis has been the rules that regulate the coercive enforcement of contracts by the state.

These developments in American legal thought, influenced by American pragmatism, and the claim that truth was not to be found in the abstract logic of ideas, but in their practical consequences, also called into question the claim that legal reasoning could imitate geometrical forms of argument. Such deductive reasoning suppressed the moral or political choices that were inevitable between possible inferences in long chains of reasoning. Likewise, deductive reasoning, by assuming contradictory postulates, could produce radically different ethical systems. Indeed, such forms of reasoning have, themselves, come under sustained attack. Mathematicians and geometers had come to understand that geometries were formal logical systems based on arbitrary assumptions whose only essential attributes were self-consistency with no necessary connection to reality. Similarly, it was possible to invent different logics like the different non-Euclidean geometries. Consequently, there are no universal laws of logic attributable to the universe or to human reason. They are merely human conventions, valued only for their usefulness. Similarly, mathematics was simply a humanly devised tool with no connection to any metaphysical or theological absolutes. Thus, all logical and mathematical reasoning is purely tautological, the elaboration of implications contained in the definition used, according to problematic, socially-created, formal systems of thought. This critique of logic and mathematics undercuts all pretensions to *a priori* and absolute knowledge. There was no such thing as abstract reason and impartial legal theory. Moral beliefs and social preferences were prior to reason, and we needed to be conscious of the philosophical assumptions underlying our actions. This account has not gone further into the critique of the impoverished idea of human intelligence that underlies the Enlightenment project and economic rationalism. That critique can, however, be summed up in the following words of D H Lawerence; in his poem *Thought*:

> "Thought, I love thought.
> But not the jiggling and twisting of already existent ideas.
> I despise that self-important game.
> Thought is the welling up of unknown life into consciousness,
> Thought is the testing of statements on the touchstone of the conscience,

> Thought is gazing on the face of life, and reading what can be read,
> Thought is pondering over experience, and coming to a conclusion.
> Thought is not a trick, or an exercise, or a set of dodges,
> Thought is a man in his wholeness wholly attending."[12]

Within the American legal profession, objective contract theory, and legal theory more generally, has been recognised as 'Euclidean', proceeding deductively from what were claimed to be 'self-evident truths' about the judicial process. But many of the *a priori* assumptions of traditional legal theory are themselves subject to significant attack. Indeed, for Frank, the legal profession manipulated abstract concepts to construct a façade of certainty and absolute rationality over a confused legal process.[13] Such positivist legal theory, and positivist social science, suppresses political and moral discourse by appropriating the prestige associated with the natural sciences and conferring a privileged position on the status quo and on the professional expert - be it a judge or social scientist - with a capacity for judgement based on claimed technical expertise, neutrality and impartiality. It is also reflected in the increasing professionalisation and credentialism of political, social and academic discourse and the need for such professionals to justify their prestige and influence. Such 'scholasticisms' were merely escapes and delusions. In practice, judges shared and implemented either their personal standards, the moral standards of the legal profession, or the moral standards of those members of society they admired, with the reasons given for judgements being rationalisations that manipulated the language of precedents to produce the desired result.

The rejection of the possibility of demonstrating the truth of ethical propositions has left such moral ideas without a convincing theoretical basis. But this does not, in itself, undermine the fundamental significance of such ideas for the stability of society. Paradoxically, the declining faith in the expertise, neutrality and impartiality of experts has led, in the United States in particular, to a reinvigorated emphasis on proceduralism within the law and within political theorising. But it is a proceduralism that, imitating the alleged neutrality of the market, is biased in favour of the existing distribution of wealth, power and privilege, and refuses to look at substantial outcomes of legal and market processes. Thus, in the case of the equitable doctrine of unconscionability within Australia, it has been seen that, while there has been a steady increase in concern

about procedural unconscionablity, there has been a considerable reluctance to formally extend the doctrine to cover substantive issues. More broadly with such theories as Rawls's *Theory of Justice* there has been a major theoretical effort to revive social contract theory and procedural accounts of justice. These reflect a desire to accommodate the positivist claim that values were incapable of objective determination, a claim that assumed a privileged epistomological status for scientific knowledge. Thus, the claim is made by Hart and Sacks:

> "These institutionalized procedures and constitutive arrangements establishing them are obviously more fundamental than the substantive arrangements in the structure of society. . . The principle of institutional settlement expresses the judgement that decisions which are duly arrived at as result of duly established procedures of this kind ought to be accepted as binding upon the whole of society unless and until they are duly changed."[14]

We see a similar attempt in the use of economic concepts to model politics. Consensus theorists attempted to achieve the same accommodation with the positivists by trying to locate social and political norms in widely shared customs and conventions. But the extent to which there are such widely shared norms, or even underlying shared norms, remains problematic. It may simply be that values conflicting with the interests of the economic and political elites are simply suppressed. Others have sought to return to a natural law tradition or to some form of Aristotelianism. But the attempt to find a rational, ethical foundation for our social, political and legal systems remains hotly contested. And as our discussion in Chapter 4 indicated, it is ever likely to remain so. But this general lack of agreement has the effect of undermining the credibility of our moral and philosophical theorists and of this form of theorising.

Hutchison sees dangers in four intellectual 'cults' which infect such attempts at theorising: a cult of scepticism holding that all beliefs, with the possible exception of scientific discoveries, were simply matters of opinion; a cult of presentism maintaining that only the present was meaningful; a scientism that assumed that empirical knowledge was the answer to all human problems; and finally, an anti-intellectualism that downgraded the intellect and raised the human will to a position of primacy.[15]

Consistent with the account given by Rorty and Toulmin, the first three 'cults' flow directly from the Enlightenment project. Indeed, the radical scepticism of the Enlightenment has undermined its own project, there is nothing of which we can be absolutely certain, and there is no way of avoiding belief as the ground of our moral values or, indeed, anything else. As for the fourth 'cult', this seems to be a well-justified reaction to the arrogance and dogmatism of past intellectual optimism and pretension, the lack of intellectual humility that seems to have infested the entire Western intellectual tradition since Plato and Aristotle.

The total social environment may be too complex, and the human mind too limited, for us to fully understand the scope and operation of our social activities, a view with echoes in Hayek[16], Habamas[17] and Arthur[18]. Abstract ethical theories are simply a historical, cultural phenomenon, the progressive invention of humans striving to deal with the uncertainties of day-to-day life, the mystery of human existence, and to give themselves some purpose. They can only do so from within a paradigm, or as MacIntyre would prefer, from within a tradition.[19] As such they are only a limited part of a much broader human conversation.

**DEVELOPMENT**

The above marks a profound loss of confidence in scientific rationalism and in the associated moral speculation that dates from the Enlightenment. It points squarely to the normative basis of such speculation. Consequently, it also challenges the application of that speculation, particularly economic speculation to public policy problems. Thus, economic speculation in its Newtonian guise, is simply one way, among many possible ways, of speaking about the social world. It heralds a search for alternative ways of talking about, and trying to make sense of, the world and its bewildering confusions, both as a source of existential comfort and as a guide to actions. But, in the face of this confusion, and our inability to firmly ground our speculations, public policy formulation has to be seen as an experiment in which the criteria for success, the evaluative vocabulary, are cultural artefacts, inventions of the human heart and mind.

The theologian Reinhold Nielbuhr shared this loss of confidence. For him there was simply not enough intelligence to conduct the intricate affairs of a complex civilisation, though he initially believed that intelligent analysis and experiment could help overcome social evils. He also believed in the incommensurability of individual and group morality. Like James, Nielbuhr was convinced of the indeterminateness of the universe and the relativity of all human knowledge:

> "God, though revealed, remains veiled; his thoughts are not our thoughts nor his ways our ways. The worship of such a God leads to contrition; not merely to a contrite recognition of the conscious sins of pride and arrogance which the human spirit commits, but to a sense of guilt for the inevitable and inescapable pride involved in every human enterprise."[20]

For Neilbuhr, as for this author, God exists, and consequently, absolute truth also exists. This provides an absolute basis for human hope and morality. But God's transcendence places that Truth beyond our reach. Consequently, God's absolute Truth can never fully become our truth, nor can we know how much we possess. Indeed, the human search for knowledge is necessarily tainted by self-interest. Consequently, the truth we know is necessarily personal and limited. Nevertheless, we continually proclaim our personal truths as universal, in the vain belief or hope, that we are masters of the universe. The Enlightenment merely succeeded in displacing the Christian vision of God as creator, redeemer and sanctifier, from the centre of the universe. It replaced this vision firstly with a more limited and non-Christian, anthropomorphic, masculine vision of God as a Rule-maker, and then, in turn, with Man within Nature. But surely in this age, the idea of humans, let alone men, being at the centre of the universe is bizarre. The idea of nature as the ultimate ground of all being is also not much of a god, around which to build a life or a moral discourse.

Indeed, the Enlightenment's assumption that the universe was rational and benevolent is fundamentally wrong. The price of freedom, of change, and of progress is finitude, failure, uncertainty, decay and sin. At best, the universe provides a partially stable background in which we make our play and narrate our stories, including the stories of

our own lives. All too often, the social world which we create, the narratives we use are dominated by power, selfishness and passion. In this climate, the scientific tradition, and economic thinking, all too often become the tools of the dominant social group.

> "No society and no social group can ever escape the vicious circle of the sin which aggravates human insecurity in seeking to overcome it. All societies and individuals must therefore remain under the judgement and the doom of God."[21]

Consequently, Nielbuhr rejected faith in progress, pointing out that societies were dominated by necessarily selfish groups and that scientific knowledge, popular education, or universal Christian love could not end group conflict.[22] Belief in human progress and scientific achievement were the height of sinful pride and led unavoidably to disastrous failure. The greatest intelligence and the noblest ideals inevitably led humans to set themselves about God's teachings. Only a profound Christian humility before a transcendent God that acknowledged our finiteness, and limited vision could help alleviate much social oppression. Of course, this critique of human dogmatism extends to dogmatic absolutist claims within Christianity itself. Thus for Neilbuhr,

> "there is no historical reality, whether it be the church or government, whether it be the reason of wise men or specialists, which is not involved in the flux and relativity of human existence; which is not subject to error and sin, and which is not tempted to exaggerate its errors and sins when they are made immune to criticism."[23]

If the 'Children of Light' were ever to establish a humane and stable society, they had to abandon excessive faith in the goodness and rationality of humanity and to recognise human sinfulness, and self-interestedness. This vision was only attainable on the basis of revelation. The present author would not limit that revelation to the canonical texts of the Bible but would extend it to that revelation of the Divine Mystery that results from the close friendship with God to which all peoples are invited. This view does not lead to any reinstatement of natural law, certainly not to any assertion of absolute human rights, let alone absolute property, or indeed to the reinstatement of some form of Aristotelian virtue, however much the moral vocabulary derived from those traditions may continue to figure in social and political discourse. Rather, it leads to a humble journeying, an uncertain search for the right and the good. It is always uncertain, it is

always a groping. Dogmatism has therefore to be foresworn as we can only see a partial and distorted vision of the Kingdom. The kingdom that can be grasped is not the Kingdom. Reality always falls short of the Kingdom, though it is an image of the kingdom that inspires a striving for newness of life.

In summary, Nielbuhr added to pragmatic and relativistic social theory a profound appreciation of human evil, an appreciation founded in his Christian tradition, but absent from Enlightenment optimism. But this optimism was an illusion. Marxism was only distinguished from liberalism by sharper and more specific schemes for identifying and endowering an elite with power. This critique of Marxism's particular claim to certain knowledge of the end towards which history must move, and its associated willingness to sacrifice every value to that end, applies with equal force to alternative pretensions about the end of history and to any absolutist faith in markets, and freedom of contract. Indeed, for Boorstin:

> "To say that a society can or ought to be 'unified' by some total philosophical system– whether a Summma Theologica, a Calvin's Institute or Marx's capital – is to commit oneself to an aristocratic concept of knowledge: let the elite know the theories and values of the society: they will know and preserve for all the rest."[24]

Such elitism is the very reverse of the intellectual humility that Nielbuhr called for. Of course, the acceptance of a relativist position can all too easily lead to an acceptance of the political and economic arrangements of the current dominant state, the United States, as the norm.[25] The particular danger for us is that the American anti-statist tradition that dates from Locke, and was encouraged by secularised American Calvanism and by Spencer's social Darwinism, will become the moral standard by which we should judge our institutional and organisational arrangements.

Consistent with Nielbuhr, Stackhouse[26] advances a Biblical covernantal view of justice, supplemented the Catholic model of 'subsidiarity' and by 'fairness as equity'. As we saw in Chapter 4, the idea of covernant comes from the social and religious history of the ancient mid-east, where divine authority was invoked as a witness to morally binding agreements. The Old Testament relates how this "basic, 'mutual', oath-bound

creation of responsible relationships"[27] was recognised to be a close analogy of the way in which God relates to humanity and a model of how we should relate to each other under God. And it involves a revelation of the nature of a just, merciful God who directly engages in the formation and sustaining of righteous living in community. This justice of a covenanting God is pre-given in that it is constituted by a standard and ultimate end that humans do not make; but is unfinished in that the standards of right and wrong, good and evil are neither fully recognised, nor completely fulfilled in this life. Thus, the deontological right and the teleological good must both be fulfilled and joined for full justice. Yet, Stackhouse recognised, as does moral philosophy more generally, that a tension exists between these two views of justice which has not been reconciled.

As was shown in Chapter 4, the development of the ideas of social contract was influenced by these Old Testament covenant ideas. However, a fuller understanding of the implication of those ideas was lost in Locke's appeal to the Natural Law rights and in Deism's limited vision of God as a rule giver. This covenant view directly leads to the rights of humans to develop religious, educational, social, and political organisations to exemplify their best vision of the ultimate good and how it is related to what is right. But it recognises that than a individualistic understanding of human rights provides only a partial understanding, for it fails to recognise that humans are inevitably relational beings, called to live in groups and to assume associated responsibilities. Freedom and rights are best used to fulfil responsibilities in interpersonal and civil life. Consequently, Stackhouse sees contract theories among those who see no need for a higher moral law or greater purpose, and for whom morality consists of what ever is agreed, as a degeneration of the covernantal idea and the greatest temptation in the West.[28] Rather,

> "the full actualization of the right and the good in our inner lives, in our human relationships, and in the matrices of social life cannot be attained on humanistic grounds alone but . . . a divine initiative must be taken."[29]

The social contract tradition involved a progressive impoverishment of the covenant idea with the progressive secularisation and impoverishment of the natural law ideas that underpinned Lockes' account and resulted, *inter alia*, in the reification of the

concept of 'freedom of contract'. But it is a degeneration implicit in Lockes' appeal to a Natural Law assessable to human reason. It was only late in the day that we have come to realise that the appeal to nature involved in that process of secularisation effectively removed the moral content of the tradition. In contrast, Stackhouse's covernental account of justice would lead directly to a relational view of the law of contract such as advanced by McNeil, a view far more concerned with the substantive outcomes of contractual relationships, which recognised a substantial duty of care on the part of the parties towards each other.

## ECONOMICS AS A SECULAR RELIGION

The Enlightenment's search for neutral principles as a secular alternative to traditional religious authority and beliefs to justify our moral decisions, is itself a religious search, serving the same dogmatic and legitimating functions of what Bergson calls static religion.[30] Economics claims to provide that secular justification for many contemporary policy choices. Indeed, economics threatens to become the dominant rationalist and fundamentalist religion of contemporary capitalist society and of the emerging global civilisation. This threat is aided by its attempt to appropriate the prestige associated with the natural sciences. Importantly, it is easy to slip between the use of individualism as an analytical tool to a promotion of individualism as a normative ideal. Thus, this religion is of particular appeal to business and political elites who gain from economic and social developments, because it tends to legitimise greed, love of money and power. It is leading to the commercialisation of all human activity, while aiding the atomisation and privatisation of competing values and groups. It has elevated money beyond a convenience to the means of salvation and the source of meaning, values and security and thus turning it into an idol.[31]

Economists, the prophets and priests of this new religion, preach about, and have a substantial impact on, public policy and our institutional arrangements. Economics thus provides an alternative faith tradition, complete with values, ideas of welfare and of progress, usually defined in terms of quantitative economic indicators, which dominate public discourse and which seek to reshape our institutions and organisations.[32] With

their influence over government, economists are the new theocracy, the contemporary manifestation of Plato's guardians. This apparent similarity between economics and religion has often been the subject of comment. For example, the American theologian Harvey Cox[33] has recently reported that most of the concepts he came across when reading the business pages were quite familiar. The language of those pages bear a striking resemblance to Genesis, the Epistle to the Romans, and Saint Augustine's City of God. Indeed, Cox claims to have made out an entire theology, a grand narrative about the inner meaning of human history, why things had gone wrong, and how to put them right. In the business pages, in only thin disguise, are the theologian's myths of origin, legends of fall and doctrines of sin and redemption: chronicles about the creation of wealth, the seductive temptations of statism, captivity to faceless economic cycles, and, ultimately, salvation through the advent of free markets, with a small dose of ascetic belt tightening along the way. There were even sacraments to convey salvific power to the lost, a calender of entrepreneurial saints, and what theologians call eschatology – a teaching about the end of history. In particular, the economic theologian's rhetoric resembles contemporary process theology. In this school, although God will possess the classic attributes of omnipotence (all power), omniscience (all knowledge)and omnipresence (present everywhere), He does not yet possess them in full. Such a theology offers considerable comfort to the economic theologian, explaining the dislocation, pain and disorientation that are the results of transitions from economic heterodoxy to free markets. Thus, the market is becoming more like Yahweh of the Old Testament – not just one superior deity contending with others, but the Supreme Deity, the only true God, whose reign must now be universally accepted and who allows no rivals. There is no conceivable limit to The Market's inexorable ability to convert creation into commodities. In the church of The Market, everything, no matter how sacred, eventually becomes a commodity. This radical desacralisation dramatically alters the human relationship to land, water, air, and space. Indeed, human beings, themselves start to become commodities as well. This comprehensive wisdom of The Market is something that, in the past, only the gods have known. In ancient times, seers entered a trance and informed anxious seekers of the mood the gods and whether the time was auspicious for particular enterprises. Today the financial media are the diviners and seers of The Market's moods, the high priests of

its mysteries. Cox concludes that that "The Market" has become the most formable rival to traditional religions, not least because it is rarely recognised as a religion. For Cox, the contradictions between the world views of traditional religion and the world view of the Market religion are so basic that no compromise seems possible.

This critique has much in common with the broader critique of 'autonomous technology' developed by Ellul[34] and by Winner[35]. For Ellul *la technique* is sacred in our society. No social, human or spiritual fact in the modern world is so important. It transforms everything it touches, including the socio-politico-religious software that runs the system, into a machine. It is the pattern of organisation, the rationalisation of society, beyond the willingness of anyone to accept responsibility. Technical means have become ends in themselves. This attack is particularly directed against the technocrats to whom we have handed over our ethical responsibilities. In the process of implementing their utopian vision a narrow technological and theocratic elite is in the process of redefining the evaluative methodology for social action, our social goals, our social institutions and who we think we are.

Efficient ordering is the only principle of the ever-expanding and irreversible rule of technique. It is the unconscious response to every challenge and is being extended to all areas of life. Means are remade into ends as we are increasingly committed to continually improved means to ends that are only poorly examined. Of particular concern to Winner are the changes that have taken place in ordinary language, traditional social institutions, earlier kinds of artefacts, human identity, personality, and conduct. Efficiency, speed, precise measurement, rationality, productivity and technical improvement have all become ends in themselves and are applied obsessively to areas of life from which they had previously been excluded. In particular, efficiency has become a more general value, the universal principle for all intelligent conduct. It is not that such instrumental values are themselves perverse, but the fact that they have escaped from their proper sphere:

Technique refuses to tolerate competing moral judgements, excluding them from its field in favour of its own technical morality. Consequently, human beings have become

objects, no longer choosing agents, but devices for recording the results obtained by various techniques. Decisions are no longer to be made on the basis of complex and human motives, but only in favour of the technique that gives maximum efficiency. In the process the qualitative to become quantitative, and every stage of human activity is forced to submit to mathematical calculations. Whatever cannot be expressed numerically is to be eliminated. And all the technical devices of education, propaganda, amusement, sport, and religion are mobilised to convince us to be content with our condition of mechanical, mindless 'mass man', and to exterminate the deviant and the idiosyncratic.

In particular, technique forms the very substance of economic thought. Technical economic analysis has been substituted for political economy and its concern with the moral structure of economic activity. In seeking to grasp, but also to modify it is no mere instrument but possesses its own force. This technical orientation is particularly evident in the application of mathematics and statistical techniques to economics In the economic sphere, as in others, the technicians form a closed fraternity with their own esoteric vocabulary from which the layman is excluded.

Thus, technique involves the progressive dehumanisation of the economic sphere in which the abstract concept of *homo economicus* becomes real. Not only has the entire human being absorbed into the economic network validating the producing-consuming parts of the human, the other facets have been progressively devalued. Consequently, all values have been reduced to money values. The whole of human life has become a function of economic technique. This is particularly so in respect of work.

Politics in turn becomes an arena for the contention among rival techniques. The consequence is the progressive suppression of ideological and moral barriers to technical progress. In this environment, the conflict of propaganda takes the place of the debate of ideas. Technique only permits public discussion of those ideas that are in substantial agreement with the values created by a technical civilisation. This technical economy is anti-democratic, a form of slavery. Despite all the talk about freedom and

popular sovereignty, people are unable to exert any genuine influence on the direction of the economy, and their votes count for very little.

For technique, there is there no mystery, no taboo, no rules outside itself. Because people cannot live without a sense of the secret, or the sacred, they have created for themselves a new religion of a rational and technical order. Indeed, since the religious object is that which is uncritically worshiped, technology has become the new god. Technique has become the essential mystery. For the technician in particular, technique is the locus of the sacred, an abstract idol, the reason for living. Without, technique they would find themselves poor, alone, naked, and stripped of all pretensions. They would no longer be the heroes, geniuses or even 'archangels'. Thus, technique is the god which brings salvation.

These technological influences have become so much part of everyday life that they have become virtually invisible. For both Ellul and Winner, there can be no human autonomy in the face of technical autonomy; people have lost their roles as active, directing agents:

> "Each individual lives with procedures, rules, processes, institutions, and material devices that are not of his making but powerfully shape what he does. It is scarcely even imaginable what it would mean for each of us to make decisions about the vast array of sociotechnical circumstances that enter our experience."[36]

Consequently, technical rationality and modernisation pose a particular and significant challenge to liberalism. They are incompatible with the central notion that justifies the practice of liberal politics: the idea of responsible, responsive, representative government. In the technocratic understanding, the real activity of governing can have no place for mass participation. All of the crucial decisions, plans, and actions are simply beyond their comprehension. Indeed, this technological society is not governable. Rather, the ideal is of a self-directing and self-maintaining system, requiring no human direction. This is true even of the means of analysis itself, the meaning of 'rationality' having been distorted and corrupted by these technocratic tendencies. For Ellul,

> "Every intervention of technique is, in effect, a reduction of facts, forces, phenomena, means, and instruments to the schema of logic."

Similarly for Max Weber:

> "The fate of our time is characterized by rationalization and intellectualization and, above all by the 'disenchantment of the world.'"[37]

The price that is for this rationalisation is the loss of freedom. It is ironic that the libertarians' search for increased human autonomy in practice ends in the loss of the value that they claim to hold dearest.

## THE NEED FOR HUMILITY

The critique developed in this thesis of rationality and of deductive reasoning does not question the need to use concepts to bring some order to experience. There is nowhere else to go. Rather, it questions the use of concepts that are so general, at such a level of abstraction, that they loose touch with empirical reality. This is particularly so where they are conceived of as absolutes. In such circumstances, their application as a guide to action is inherently problematic and ideological. The perspective to be drawn from pragmatism, and from Nielbuhr and from Stackhouse in particular, should make us wary of such God-like pretensions and to become more aware of the need for humility about our limited abilities, our intellectual techniques, our intellectual speculations and our actual policy decisions.[38] Absolute Truth is not available to us. All truth, as we know it, is socially constructed and subject to revision, sometimes radically.

The substantial judgements involved in public policy development are moral rather than technical. It is the quality of our moral judgements, and the sensitivity of our moral vocabulary, rather than the quality of our economic logic, that is the crucial element in public decision-making. Judgement needs to be informed by a moral sensitivity to the needs of others, wide learning, deep reflection, wide consultation and by wide experience of the practical world. Thus, we need to acknowledge that it is not so much the lack of technical knowledge that inhibits government policy as the particular set of dominant moral values which shape what is possible to think and to do.

We need to be particularly wary when it comes to postulating this or that as an overarching moral principle with priority over all other values. Despite pretensions to the contrary, economics does not and cannot provide the moral equivalent of a unified field theory, an equivalent of the physicists holy grail, which can be invoked to justify collective action directed by government. For example, there is no ideal form of social or economic organisation against which to measure actual organisations - the forms of organisation used in the private sector do not provide an ideal form or vocabulary that must be emulated.

Of particular note is the prevalent tendency to fasten onto a particular interpretation of human rights and of liberty, to make them into absolutes, and then to use those interpretations to exclude collective action based on other values. Thus we have tended to elevated individualism, freedom of contract, and economic efficiency above values that point to mutual interdependency, and to responsibilities for our neighbours. Thus, such humility should make us more conscious of the needs and claims of others in contrast to our own needs and claims. It should make us more conscious that we frequently lack the knowledge for sound decisions, and thus of the need to consult widely, to proceed carefully, to be willing to experiment, and to reverse direction. Humility should also make us aware of the pretensions of rational and of the need to accord emotions and values a legitimate role in decision making.

We should be more careful about such abstractions as 'the economy', 'the market' and particularly 'the labour market'. In the practical policy debate, the fact that these are abstractions has long been forgotten - the dancers have become the servants of the steps. We should also be more careful about the division of people and their social groups into rigid categories. Rather, we should admit that is it difficult to unscramble all the influences that bear upon real people in all their relationships. In particular, we should finally abandon that crude caricature of human-kind so rightly condemned by Veblen:

> "[T]he hedonistic conception of man" as "a lightning calculator of pleasure and pain, who oscillates like a homogenous globule of desire of happiness under the impulse of stimuli that shifts him about the area, but leaves him intact . . . Self imposed in elementary space, he spins symmetrically about his own spiritual axis,

until the parallelogram of forces bears down upon him, whereupon he follows the line of the resultant. When the force of the impact is spent, he comes to rest, a self-contained globule of desire as before."[39]

This critique should also serve as a reminder to avoid seeing the complex issues we confront in the world through simple dichotomies. Unfortunately, most policy debate occurs at a simplistic, markets are good/governments are bad, level. Rather, as Popper recommends, in the search for knowledge, every source, every suggestion is welcome, while all are open to critical examination. Qualitatively and quantitatively, by far the most important source of our knowledge - apart from inborn knowledge - is tradition.[40]

In particular, the current distinction made in public debate between the public and the private sectors is overdrawn. We quickly forget that what we are really talking about are real, interdependent groups of people engaged in complex interrelationships, involving different and complex organisational structures and in a bewildering variety of activities and exchanges. Governance is a necessary part of all of those activities. It is only the types of governance that are in question. This is a question that cannot be answered on the basis of *a priori* reasoning. Collective action is a necessary part of any complex society and the Government is a legitimate organ of that collective action. Limitations on that government action are not to be established on the basis of abstract *a priori* reasoning but on the basis of experimentation within the framework of a political tradition.

## COMPLEXITY

As has been shown, current Australian public policy debate is heavily constrained by a belief on the part of many participants that there is some acceptable theoretical basis for determining the role of the government, or that such a basis is attainable. The very language of the discussion contains this belief. An artificial dichotomy has been envisaged between the market and the state which fails to recognise the interdependencies within our economic system. It is a dichotomy based on an idealised conception of markets that is grounded neither in fact nor economic theory.

The claims of neo-classical economics to intellectual rigour are also subject to innumerable challenges dispute at a more detailed level. In response to these detailed attacks, many economists have insisted that critics provide an alternative meta-theory. In doing so they have not realised the key role that metaphors play in theory formation. Consequently, they have not understood the extent to which their economic thinking has been bounded by the Newtonian metaphor, and by their search for 'natural laws' of the economy analogous to those of mechanics. They have assumed that economic phenomena can be treated as if they were natural phenomena, caused by natural forces, and not social phenomena, the result of social invention and institutions. Running through the history of this economic thought is a persisting effort to evade responsibility for the outcomes of the economic system, a responsibility that would have to be faced were the idea of Natural Law to be abandoned. In the process, economic theory has been emptied of its historical and social elements. Nor has economics faced up to the normative judgements involved in the choice of metaphors and the extent to which they can serve to legitimate the existing social order and the privilege of the commercial and policy elites.

Since the Enlightenment, the physical sciences, and the reductionist method, have established priority over other ways of knowing because of their ability to produce reproducible results, accurate predictions and plausible explanations. However, this form of mastery is unlikely to be achieved of systems as complex as the social and economic systems. In any event, given human freedom of action, there is no prior reason to believe that society will exhibit the types of natural regularities seen in the physical sciences.

Part of a search for a better understanding must be the recognition that we are part of an indivisible totality that we, in all our complexity and diversity, have a share in creating, in partnership with our ancestors. Important support is given to a new holistic approach to economic speculation by the new science of complexity. Complexity is not simply a new reductionist model, but a new way of looking at the world which attempts to deal with the interconnectedness, interdependence, and nonlinearity of systems.[41] Such a

complex system cannot be understood through the reductionists method, as the whole is greater than the sum of its parts. Real complex systems cannot be successfully modelled mathematically because of the extraordinary difficulty of the mathematics involved, and the radical differences that small differences in initial states can make. The way ahead is not through the reductionist approach and a more refined Newtonian model. There is a fundamental mismatch between our predominant ways of thinking about reality derived from the Enlightenment scientific tradition and the nature of reality in a complex system.[42]

Brian Arthur has argued the alternative to the Newtonian model is Taoist. It involves the recognition that there is no inherent order underlying economic phenomena. Consequently, our economic institutions are matters for social choice. And we have to learn to live with the relativism and circularity that this involves. As Arthur explains:

> "The world is a matter of patterns that change, that partly repeat, but never quite repeat, that are always new and different."[43]

There is no perfect system to be discovered, no magic word which would remove our responsibility for ourselves and each other. This involves abandoning the idealisation of The Market that is at the heart of economic rationalism.

What this means for policy is that there is no one right approach to policy or to organisational arrangements. Just as biological organisms have evolved a bewildering variety of organisms, it is reasonable to expect a wide variety of approaches in social organisations. Such variety is not to be despised, rather it is to be valued as it may well reflect subtle or even coarse differences in environment or a degree of 'indifference' between approaches. Secondly, complexity in environmental circumstances may be so great as to defy analysis. It is not possible in principle to list in order of importance the influences affecting a complex system. History cannot be ignored. It shapes the evolution of a complex system and consequently, a complex system cannot be understood in isolation from its history. Similarly, the state of 'fitness' of an organisation cannot be determined by reference to crude reductionist criteria, but may, perhaps, be reflected in broad measures of confidence and happiness which reflect some common judgement.

The organisational capital of such a system is not primarily in its physical endowments but in the complex network of relationships formed within that system and the knowledge held within that network. Our evolved institutional arrangements, ethical rules, legal rules, conventional ways of behaving and popular culture, are all part of the organisational capital of our system, are critical to the effectiveness of the system and cannot be ignored and constantly need to be renewed. Such values assume critical importance. One of the features of complex systems is that they emerge at the edge of order and chaos. Consequently, they can be highly unstable. Fundamental changes in the values and rules that underpin our society of the type advocated by economic rationalists and to some extent implemented in Australia in recent times may therefore have unforseen and radical implications that we will all regret. Importantly, both cooperation and competition are of fundamental importance to the evolution of complex social systems and we are unable to assign priority between them

An inability to deduce an appropriate theoretical framework does not, however, reduce us to impotence. But it does mean that there is no alternative to experimentation. Nor are the criteria to be applied in assessing those experiments written in the heavens. Thus a balanced approach would not be one that rules some classes of Government action as inadmissible on theoretical grounds, nor would it suggest that all possible Government actions would be beneficial. But the experiments need not be all ours. Rather the way ahead should be characterised by a more careful examination of the models and approaches used elsewhere, and a more careful examination of the policy problem. Effective policy design has often been seriously inhibited by too much ideology, with too little attention being paid to the practical problems of policy implementation and of securing behavioural change.

In framing practical policy, the important question is 'What works?'. But the question cannot be asked in isolation from our moral, religious and political traditions. The answer is more to be found in experimentation backed by empirical investigation of the consequences, than in *a priori* reasoning, and high level abstraction. It involves substantive moral judgements and moral sensitivity, not formal logic. It follows that the policy development process should properly be seen as a pragmatic, eclectic and

political. We should acknowledge that public policy decisions legitimately involve balanced judgements against potentially conflicting criteria, not a departure from a postulated market ideal for 'illegitimate' social and political reasons. It should encourage a much closer examination of the environment, a much closer examination of policy approaches others have employed along with an assessment of their impact, and a willingness to engage in careful experiment. We also need to recognise the limitations of past policy development processes and to commit ourselves to changing those processes.

While structures are very important, their effectiveness, and the effectiveness of public and private networks ultimately depend on trust. Economic rationalism has neglected the essential contribution that moral conduct makes to the capitalist system and our governance structures. Many economists have no concept of history and of the delicately constructed social fabric which makes the difference between workable and unworkable market economies. Nor do they have an adequate understanding of the complex motivations which bind individuals into functioning organisations and effective economies. Sound business ethics, and moral conduct more generally are an essential part of the social infrastructure. But that moral conduct cannot be simply reduced to compliance with rules. The law established the minimum standards of behaviour required of citizens before social sanctions are applied, not the optimal standards.

**REFLECTION**

For Robert Bellah, *et al*, in *The Good Society*, social science and policy analysis have not taken the place of public philosophy but, instead, have regrettably strengthened the notion that our problems are technical, rather than moral and political. In this they echo the critique developed by Ellul and Winner. In particular they are concerned at the erosion in trust in the political system and public institutions that results from the current emphasis on Lockean individualism and the associated economic theorising with its emphasis on efficiency. It threatens to undermine our democracy. In their words:

> "If policy elites stand outside the world of citizens, designing social policies evaluated in terms of outcomes, efficiency, or costs and benefits, as they define

> them, they short-circuit the democratic process, and this is so whether they believe that people are essentially 'interest maximizers' or even that they are motivated in part by 'values'. Politics under these circumstances becomes the art of image manipulation by expert media managers."[44]

The consequence is a gross abuse of power that eats at the heart of the Liberal tradition.

No society can survive without stable moral traditions and social conventions backed up by effective means of coercion. But the prevailing scepticism about the possibility of establishing any moral principle as true or valid beyond reasonable doubt has the immensely troubling implication that we are unable to identify the difference between might and right.[45] We have, nevertheless, a highly developed moral vocabulary, and a long political tradition, both of which provide a source of stability. This represents the social and moral capital of our civilisation. However, Brennan and Buchanan[46] have argued there is now a widely sensed deterioration in the social, intellectual and philosophical capital of Western civil order. Hirsch had a similar sense of foreboding, believing that an excessive reliance on self-interest as the fundamental social organising principle would undermine the basis of the market system itself:

> "In brief, the principle of self interest is incomplete as a social organizing principle. It operates effectively only in tandem with some supporting social principle. This fundamental characteristic of economic liberalism, which was largely taken for granted by Adam Smith and John Stuart Mill in their different ways, has been lost sight of by its modern protagonists . . . The attempt has been made to erect an increasingly explicit social organisation without a supporting social morality . . . In this way, the foundations of the market system have been weakened, while its general behavioural norm of acting on the criterion of self-interest has won ever-widening acceptance. . ."[47]

The fear is that in acting on the precepts of economic rationalism, modern governments have participated in changes in the institutional structures of their societies which may weaken the matrix of social rules on which their economic systems depend. For their part, Foulbre and Weisskopf argue that the care and nurture of human capital has always been difficult and expensive, and that the erosion of family and community solidarity

imposes enormous costs; costs that are reflected in inefficient and unsuccessful educational efforts, high crime rates and a social atmosphere of anxiety and resentment. [48] But such forebodings are as old as civilisation itself. They may reflect the prevailing uncertainty about the foundations of our moral values as well as the intuition that civilisation is always under threat from what used to be called human sinfulness.

It is at this point wise to recall that is the control of our greed that represents one of the prime victories of culture over animality. If this is so then it is also greed that represents one of the prime threats to our civilisation - economic rationalism is an ideology that attempts to justify that greed. In particular, it promotes selfishness and materialism. But even for the non-religious, the acquisition of personal wealth and power is not a satisfactory basis for self-definition. Thus, economic rationalism represents a fundamental threat to our civilisation. Its application to public decisions cannot be reconciled with the ethical import of our Christian heritage, with its command to love God and to love one's neighbour as oneself. Taking something that is a good, such as economic analysis, or a market, or human rights, or liberty, or law, and turning it into something that is an absolute is the essence of a new idolatry.

## Notes

[1] Gilmore, Grant, 1974, 1995, The Death of Contract, Ohio State University Press, Columbus, pxviii
[2] Collins, Ronald K L, 1995, Foreword Gilmore, 1995
[3] Horwitz, Morton J, 1992, The Transformation of American Law 1870-1960, Oxford University Press, New York
[4] Gilmore, 1995
[5] Gilmore, 1995
[6] Horwitz, 1992, pvi
[7] Horwitz, 1992, pviii
8 Murphy, 1990
9 Purcell, Edward A Jr, 1973, The Crisis of Democratic Theory, The University of Kentucky, Lexington, p6
10 Horwitz, 1992, pp4-6
11 Horwitz, 1992
12 D H Lawerence, The Complete Poems, Harmondsworth, Middx. Penguin, 1977, p673
13 Purcell, 1973
14 Hart, H and A Sacks, 1958, The Legal Process, Harvard University Press, p3-4
15 Purcell, 1973
16 Frowen, Stephen F, 1997, Hayek: Economist and Social Philosopher, Macmillan, London
17 Habamas, J
18 Waldrop, Mitchell, 1992, Complexity, Viking, London
19 MacIntyre, 1981
20 Niebuhr, Reinhold, 1965, Beyond Tragedy: Essays on the Christian Interpretation of History, Nisbet, London, p45
21 Niebuhr, 1965, p108
22 Nielbuhr, 1944
[23] Niebuhr, 1944, pp70-71
[24] Boorstin, Daniel J, 1958, The Americans,Random House, New York, p168
[25] Purcell, 1973
[26] Stackhouse 1999a, Mutual Obligation as Covernantal Justice in a Global Era, Paper delivered at A Colloquium on Hard Choices, John XXIII College, ANU, 29 September 1999
[27] Stackhouse, 1999a, p2
[28] Stackhouse, 1999a, p22
[29] Stackhouse, 1999a, p9
[30] Bergson, H, 1935, The Two Sources of Morality and Religion, Macmillan, London
[31] Stackhouse, Max L, 1999b, first draft, Public Theology in Global Perspective: A Reformed View, Paper delivered at A Colloquium on Hard Choices, John XXIII College, ANU, 29 September 1999
[32] This does not mean, of course, that all economists share this faith or that it is necessarily closely tied to a close understanding of the discipline of economics. Nor does it mean that many economists lack high standards of integrity in their private lives or are not personally religious in the more traditional sense.
[33] Cox, Harvey, 1999, When Mammon Is God, Atlantic Monthly, reprinted The Australian Financial Review, 30 April 1999
[34] Ellul, 1965
[35] Winner, Langdon, 1977, Autonomous Technology, Technics-out-of Control as a Theme in Political Thought, The MIT Press, Cambridge. This work is largely a commentary on Ellul's The Technological Society.
[36] Winner, 1977, p86
[37] Winner, 1977, p180
[38] Etzioni,1988 takes a similar position.
[39] Veblen, T, 1961, The Place of Science in Modern Civilisation, Russell Sage, New York, pp73-74
[40] Karl R Popper, On the Sources of Knowledge and Ignorance
[41] Waldrop, 1992,
[42] Senge, Peter, 1992, The Fifth Discipline, Century Business, London
[43] Waldrop, 1992, p330
[44] Bellah, et al, 1991, The Good Society, Alfred A Knopf, New York, p293

[45] Reiman, Jeffrey, 1990, Justice and Modern Moral Philosophy, Yale University Press, New Haven
[46] Brennan and Buchanan, 1985
[47] Hirsch, Fred, 1977, The Social Limits of Growth, Routhledge and Kegan Paul, London, p12
[48] Foulbre N & T N Weisskopf, 1998, Did Father Know Best? in Ben-Ner, Avner & Louis Putterman, eds, Economics, Values and Organization, Cambridge University Press, Cambridge

## BIBLIOGRAPHY


Abernethy, Mark, 1997, Full weight behind fair trading report, *Australian Financial Review*, 8 July

Access Economics, 1997, *Tipping the Balance?*, July, Canberra

Allan Asher, Deputy Chairman, ACCC, Reid Report, Public hearing in Canberra on 4 November 1996. Transcript of evidence, pp374-75

Angelo, A H, and E P Ellinger, 1979, Unconscionable Contracts: A comparative Study of the Approaches in England, France, Germany, and the United States, *Loyola of Los Angeles International and Comparative Law Journal*, volume 14

Arrow, Kenneth J, 1974, *The Limits of Organization*, WW Norton & Company, New York

Atiyah, P S, 1979, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford

Atiyah, P S, 1986, *Essays on Contract*, Clarendon Press, Oxford

Augustine, St, 1972, *City of God*, Book IV, Chapter 5, Section 4, Pelican Classics

*Australian Financial Review*, 1997, Reith's blueprint for change, 1 October

Baxt, Robert, and Joel Mahemoff, 1998, Unconscionable Conduct Under the Trade Practices Act – An Unfair Response By the Government: A Preliminary View, *Australian Business Law Review*, Vol 26, February

Bellah, et al, 1991, The Good Society, Alfred A Knopf, New York

Ben-Ner and Putterman, eds, 1998, *Economics, Values and Organizations*, Cambridge University Press, Cambridge

Bergson, H, 1935, *The Two Sources of Morality and Religion*, Macmillan, London

Bita, Natasha, 1997, A parliamentary inquiry has exposed rampant exploitation of small businesses, *The Australian*, 5 June

Blaug, Mark, 1980, *The Methodology of Economics*, Cambridge University Press, Cambridge

Boorstin, Daniel J, 1958, *The Americans*, Random House, New York

Boulding, Kenneth E, 1970, *Economics as Science*, McGraw-Hill, New York

Braithwaite, John, 1993, Responsive Business Regulatory Institutions, in C A J Coady, and C J G Sampford, *Business, Ethics and the Law*, The Federation Press, Leichhardt

Brennan, Geoffrey and James M Buchanan, 1985, *The Reason of Rules*, Cambridge University Press, Cambridge

Brown, Doug, 1991, An Institutionalist Look at Postmodernism, *Journal of Economic Issues*, Vol XXV, No 4, December

Bruck, Michael von, 1986, *The Unity of Reality*, trans James V Zeitz, Paulist Press, New York

Burrow, J W, 1966,Evolution and Society, Cambridge University Press, Cambridge,

Burton, Tom and Katharine Murphy, 1997, Govt considers compromise on unfair conduct, *Australian Financial Review*, 22 September

Bush, Dale Paul, 1991, Reflections on the Twenty-Fifth Anniversary of AFEE: Philosophical and Methodological Issues in Institutional Economics, *Journal of Economic Issues*, Vol XXV No 2 June

Business Affairs Division of the Commonwealth Attorney-General's Department, 1986, Co-Operative Companies and Securities Scheme, Draft Franchise Agreement Bill and Second Draft Franchise Agreement Bill, AGPS, Canberra

Business Council Of Australia, 1997, Submission No 119, Reid Inquiry

Campbell, Lewis and Benjamin Lowett, 1987, *Plato's Republic*, Garland, New York

Campbell, Tom, 1988, *Justice*, Macmillan Education, London

Chamberlin, Paul, and Patrick Donovan, 1997, Canberra steps in to restrain the business bully-boys, *The Age*, 1 October

Clack, Peter, 1997, Small business to flex its new-found legal muscle, *Australian Financial Review*, 2 October

Clark, C M A, 1992, *Economic Theory and Natural Philosophy*, E Elgar, Hants

Coleman, James S, 1990, *Foundations of Social Theory*, The Belknap Press of Harvard University Press, Cambridge, Mass.

Commonwealth of Australia, 1906, Parliamentary Debates, H of R, Volume XXXI

Commonwealth of Australia, 1906, Parliamentary Debates, Volume XXXI

Commonwealth of Australia, 1965, Parliamentary Debates, Vol H of R 46

Commonwealth of Australia, 1973, Parliamentary Debates, Senate, Vol S57

Commonwealth of Australia, 1986, Parliamentary Debates, H of R, Vol R147

Commonwealth of Australia, 1990, Parliamentary Debates, H of R, p 3837

Cox, Harvey, 1984, *Religion in the Secular City* , Simon and Schuster, New York

Cox, Harvey, 1999, When Mammon Is God, Atlantic Monthly, reprinted *Australian Financial Review*, 30 April 1999

Department of Industry Science and Technology, 1995, *Better Business Discussion Paper*, Canberra

Department of the Treasury, 1993, *Efficiency is a fundamental objective of competition policy because of the role it plays in enhancing community welfare*, Submission to the National Competition Policy Review, Treasury Economic Paper Number 16

Downie, R S, 1972, *Roles and Values, An Introduction to Social Ethics*, Methuen & Co Ltd, London

Dunstan, G R, 1974, *The Artifice of Ethics, The Moorhouse Lectures 1973*, SCM Press, London

Durkheim, Emile, 1993, *The Division of Labor in Society*, Trans George Simpson, The Free Press, New York

Durkheim, Emile, 1993, *The Division of Labor in Society*, Trans, George Simpson, The Free Press, New York

Ellul, Jarques, 1965, *The Technological Society*, John Wilkinson trans, Jonanthan Cape, London

Elster, Jon, 1989, *The Cement of Society*, Cambridge University Press, Cambridge

Emmet, Dorothy, 1966, *Rules, Roles and Relations*, Macmillan, London

*Encyclopaedia Britannica*, 1981, 15th edition, Vol 4

Etzioni, Amitai, 1988, *The Moral Dimension, Towards a New Economics*, The Free Press, New York

Finn, PD, ed, 1987, *Essays on Contract*, The Law Book Company, North Ryde

Foucault, Michel, 1970, *The Order of Things*, Travistock Publications, London

Foulbre N & T N Weisskopf, 1998, Did Father Know Best? in Ben-Ner, Avner & Louis Putterman, eds, Economics, *Values and Organization*, Cambridge University Press, Cambridge

Franchising Task Force, 1991, Report to the Minister for Small Business and Customs, the Hon David Beddall MP, Department of Industry, Science and Technology, December, Canberra

Frisby, David and Derek Sayer, 1986, *Society*, Ellis Horwood, and Tavistock Publications, London

Frowen, Stephen F, ed, 1997, *Hayek: Economist and Social Philosopher, A Critical Retrospect*, Macmillan, London

Fukayama, Francis, 1995, *Trust*, The Free Press, New York

Gaita, R, 1991, *Good and Evil: an Absolute Conception*, Macmillan, London

Gardini, Robert, 1994, *Review of the Franchising Code of Practice*, October, Department of Industry, Science and Technology, Canberra

Gascoigne, Robert, 1994, *Christian Faith and the Public Forum in a Pluralist Society*, Colloquium 26/2

Gascoigne, Robert, 1994, *Contemporary Culture and the Communication of the Gospel*, Plenaria '94

Gauthier, David, 1977, The Social Contract as Ideology, *Philosophy and Public Affairs*, Vol 6, Number 2, Winter, pp130-164

Gerth and Mills, 1954, *Character and Social Structure*, Routhledge & Kegan Paul, London

Gilligan, Carol, 1982, *In a Different Voice*, Harvard University Press, Cambridge, Mass

Gilligan, Carol, 1983, Do the Social Sciences have an adequate theory of Moral Development?, in Norma Haan, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, *Social Science as Moral Inquiry*, Columbia University Press, New York

Gilmore, Grant, 1974, 1995, *The Death of Contract*, Ohio State University Press, Columbus

Gough, J W, 1936, *The Social Contract*, Clarendon Press, Oxford

Granovetter, Mark, 1991, The Social Construction of Economic Institutions, in Amitai Etzioni and Paul R Lawerence, *Socio Economics, Towards a new Synthesis*, M E Sharp, New York,

Granovetter, Mark, 1992, *Economic Action and Social Structure: The Problem of Embededdedness*, Granovetter and Swedberg

Grattan, Michelle, 1997, Small end of town wins, *Australian Financial Review*, 1 October

Haan, Norma, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, 1983, *Social Science as Moral Inquiry*, Columbia University Press, New York

Habermas, Jurgen, 1998, *On the Pragmatics of Communication*, MIT Press, Cambridge, Mass

Hadfield, Gillian K, 1990, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, Stanford Law Review Vol 42, n4, 927

Hamilton, Garry G, 1994, *Civilization and the Organization of Economics, in Handbook of Economic Sociology*, Princeton University Press, Princeton

Hamilton, Walton H, 1931, The Ancient Maxim Caveat Emptor, *Yale Law Journal*, l XL, No 8, June, pp1133-1187

Hart, H and A Sacks, 1958, *The Legal Process*, Harvard University Press

Hartley, Robert, 1997, Property Observed, *Australian Financial Review*, 2 October

Hausman, Daniel M and Michael S, McPherson, 1996, *Economic Analysis and Moral Philosophy*, Cambridge University Press, Cambridge

Hayek, F A, 1973, *Law, Legislation and Liberty, Volume 1, Rules and Order*, Chicago University Press, Chicago

Heilbroner, Robert L, 1986, *The Essential Adam Smith*, W W Norton & Company, New York

Heilbroner, Robert, 1990, *Economics as Ideology*, in Samuels

Hirsch, Fred, 1977, *The Social Limits of Growth*, Routhledge and Kegan Paul, London

Hirschman, Albert O, 1983, Morality and the Social Sciences: A Durable Tension, in Norma Haan, Robert N Bellah, Paul Rabinow and William M Sullivan, eds, *Social Science as Moral Inquiry*, Columbia University Press, New York, p29

Hobbes, Thomas, 1968, *Leviathan*, Pelican Classics, London

Hodgson, Geoffrey M, 1994, The Return of Instititional Economics, in Smelser, Neil J and Swedberg, Richard,eds, *The Handbook of Economic Sociology*, Russell Sage Foundation, New York

Hoover, Kevin D, 1995, Why does Methodology Matter for Economics, *The Economic Journal*, 105, p715

Horwitz, Morton J, 1974, The Historical Foundations of Modern Contract Law, *Harvard Law Review*, Vol 87, No 5, March, pp 918-956

Horwitz, Morton J, 1977, *The Transformation of American Law 1780-1860*, Harvard University Press, Cambridge

Horwitz, Morton J, 1977, Yale Law Journal, 86, pp561-564

Horwitz, Morton J, 1992, *The Transformation of American Law 1870-1960*, Oxford University Press, New York

House of Representatives Standing Committee on Industry, Science and Technology, Media Release, 1 July 1996, also cited piii Reid Report

House of Representatives Standing Committee on Industry, Science and Technology, 1997, *Finding a balance Towards Fair Trading in Australia*, (Reid Report), May

House of Representatives Standing Committee on Industry, Science and Technology, 1997, Statement of Basis and Purpose of Trade Practices Rule 408

House of Representatives Standing Committee on Industry, Science, and Technology, 1990, *Small Business in Australia - Challenges, Problems and Opportunities*, (Beddall Committee), Canberra

House of Representatives Standing Committee on Legal and Constitutional Affairs, 1989, Mergers, Monopolies: *Profiting from Competition*, Canberra

Hughes, Anthony, 1997, Inquiry into retail tenants misguided, *Sydney Morning Herald*, 13 August

Hume, David, 1878, A Treatise on Human Nature: being an attempt to introduce the experimental method of reasoning into moral subjects and dialogues concerning natural religion, Longmans Green, London and Social Contract: Ernest Baker ed, 1980, *Essays by Locke, Hume and Rousseau*, Greenwood Press, Westport, Conn

Hume, David, 1966, *Treatise of Human Nature*, Claredon Press, London

Hunter, A, 1966, *Competition and the Law*, George Allen & Unwin Ltd, London

Independent Committee of Inquiry, 1993, *National Competition Policy*, Report, August

Jessel, M R, 1875, in *Printing and Numerical Co v Simpson 1875* LR 19 Eq. At 465

Jevons, W S, *The State in Relation to Labour*, cited Atiyah, 1979, p615, citing TW Hutchinson, 1953, *A Review of Economic Doctrines 1870-1989*, Oxford University Press, p10

John Paul II, 1995, *Centesimus Annus*, St Paul Publications, Sydney

Kanth, Rajani J, 1986, *Political Economy and Laissez-Faire*, Rowman & Littlefield, Totowa NJ

Kaufmann, Walter, trans and ed, 1992, *The Basic Writings of Nietzsche*, Random House, London

Keesing, Roger M, 1981, *Cultural Anthropology, A Contemporary Perspective*, Holt, Rinehart and Wilston, second edition, Fort Worth

Kennedy, Ian, 1981, *The Unmasking of Medicine*, G Allen and Unwin, London

Keynes, J M, 1926, *The End of Laissez-faire*, The Hogarth Press, London

Klamer, A and Mc Closkey, D, 1990, Economics in the Human Conversation, in *The Consequences of Economic Rhetoric*, Cambridge University Press, Cambridge, 1988

Krygier, M, 1996, The Sources of Civil Society, *Quadrant*, October, p17

Kuhn, T S, 1970, *The Structure of Scientific Revolutions*, 2nd ed, University of Chicago Press, Chicago

Lacan, Jacques, 1991, *Lacan and the subject of Language*, ed Ellie Ragland-Sullivan and Mark Bracher, Routhedge, New York

Lavoie, Don, ed, 1990, *Economics and Hermeneutics*, Routledge, London

Lessnoff, Michael, 1986, *Social Contract*, Macmillan, Basingstoke

Lewis, C I, 1932, Alternative Systems of Logic, *Monist*, 42, October, p505

Lindblom, C E, 1977, *Politics and Markets*, Basic Books, New York

Lindblom, C E, 1982, The Market as Prison, *The Journal of Politics*, vol 44, no 2

Lipsey, Richard G and Colin Harbury, 1988, *First Principles of Economics*, Weidenfeld Paperbacks, London

Little, David, 1970, *Religion, Order and Law*, Basil Blackwell, Oxford

Llewellyn, Karl N, 1931-32, What Price Contract, *Yale Law Journal*, No 40, pps704-751

Lucke, H K, 1987, *Good faith and Contractual Performance*, in Finn, 1987

Lukes, S, 1974, *Power, A Radical View*, Macmillan, London

Lux, Kenneth, 1990, *Adam Smith's Mistake, How a Moral Philosopher Invented Economics and Ended Morality*, Shambhala, Boston

Lyotard, Jean-Francois, 1984, *The Postmodern Condition: A Report on Knowledge*, University of Minnesota Press, Minneapolis

Macaulay, Stewart, 1963, Non-Contractual Relations in Business: A Preliminary Study, *American Sociological Review*, 28 (1) 55-67

MacIntyre, 1981, 1985, *After Virtue*, 2nd edition, Duckworth, London

MacIntyre, Alaisdair, 1966, *A Short History of Ethics*, Routhledge and Kegan Paul, London

MacIntyre, Alaisdair, 1988, *Whose Justice? Which Rationality?*, Duckworth, London

Macneil, Ian R, 1980, *The New Social Contract*, Yale University Press, New Haven

Macpherson, C B, 1964, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Clarendon Press, Oxford,

Malthus, Thomas, 1973, in Leonard D Abbott, ed, *Masterworks of Economics*, vol1, McGraw-Hill, 1973, p260

Mansbridge, Jane, 1998, *Starting with Nothing*, in Ben-Ner, Avner and Louis Putterman, eds, 1998

Markoff, J, Montecinos, V, 1993, The Ubiquitous Rise of Economists, *Journal of Public Policy*, 13, I, 37-68

Marx, Karl and Frederick Engles, 1970, The German Ideology, International, New York

Mason, AM and S J Gageler, 1987, *The Contract*, in Finn, 1987

McCulloch, 1830, *Principles of Political Economy*, 2th edn, 1864, Longman Rees, Orme, brown and Green, London

McGuinness, P P, 1997, *Sydney Morning Herald*, 13 August

McKinnon, Michael, 1997, Oil groups cite petrol bias, *Herald Sun*, 14 July

McPherson, Michael S, 1983, Want Formation, Morality, and Some "Interpretive" Aspects Of Economic Inquiry, in Norma Haan et al, *Social Science as Moral Inquiry*, Columbia University Press, New York

Mead, George Herbert, 1934, *Mind, Self and Society*, University of Chicago Press, Chicago

Mill, John Stuart, 1911, *Principles of Political Economy, Book V*, Longmans Green

Minister for Home Affairs and Environment, and Minister for Employment and Industrial Relations, 1984, *The Trade Practices Act Proposals for Change*, AGPS, Canberra

Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, 1997, *New Deal: Fair Deal - Giving Small Business a Fair Go*, Statement, September

Murphy, John P, 1990, *Pragmatism from Pierce to Davidson*, Westview Press, Boulder

Myrdal, Gunnar, 1971, The Political Element in the Development of Economic Theory, preface to the English edition of 1953, cited Stark, W, *The Sociology of Knowledge*, Routledge and Kegan Paul, London

Nagel, Ernst and James R Newman, 1959, *Godel's Proof*, Routhedge and Kegan Paul, London

Niebuhr, Reinhold, 1965, *Beyond Tragedy: Essays on the Christian Interpretation of History*, Nisbet, London

Nielbuhr, Reinhold, 1944, *The Children of Light and Children of Darkness*, Charles Scribner and Sons, New York

North 1998, in Ben-Ner and Putterman, 1998

North, Douglas C, 1990, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press

Oakeshott, Michael, 1962, *Rationalism in Politics and Other Essays*, Methuen, London

Parsons, Talcott, 1949, in Sociological Theory: Pure and Applied, Free Press, Glencoe, Ill

Peirce, Charles S, 1934, *Collected Papers*, vol5, Harvard University Press, Cambridge, Mass.

Phillips, Derek L, 1986, *Towards a Just Social Order*, Princeton University Press, Princeton

Phillips, Derek L, 1986, *Towards a Just Social Order*, Princeton, New Jersey

Polanyi, Karl, 1944, *The Great Transformation*, Rinehart, New York

Polanyi, Karl, 1957, The Economy as an Instituted Process, reprinted in Mark Granovetter and Richard Swedberg, 1992, *The Sociology of Economic Life*, Westview Press, Boulder

Polanyi, Karl, 1971, *The Great Transformation*, Beacon Press, Boston

Popper, Karl R, 1959, *The Logic of Scientific Discovery*, Harper Torch-books, New York

Popper, Karl R,1958, *The Beginnings of Rationalism*, reprinted in David Millar ed, *A Pocket Popper*, Fontana Paperbacks, London

Posner, Richard, 1981, *The Economics of Justice*, Harvard University Press, Cambridge Mass.

pp62-63

Prime Minister, the Hon John Howard MP, 1997, *More time for Business*, Statement, AGPS, 24 March, Canberra

Purcell, Edward A Jr, 1973, *The Crisis of Democratic Theory*, The University of Kentucky, Lexington

Pusey, Michael, 1991, *Economic Rationalism in Canberra*, Cambridge University Press, Melbourne

Pusey, Michael, 1993, *Reclaiming the Middle Ground*, Discussion Paper No 31, Public Sector Research Centre, The University of New Sounth Wales, Kensington

Rabinow, Paul 1983, Humanism as Nihilism: The Bracketing of Truth and Seriousness in American Cultural Anthropology, in Hann, et al

Rabinow, Paul, 1983, Humanism as Nihilism, in Haan et al, 1983

Radhakrishnan, S, trans, 1973, *The Bhagavadgita*, Harper Torchbooks, New York

Rawls, John, 1971, *A Theory of Justice*, Bellknap Press, Cambridge, MA

Reid Inquiry, 1997, *Submission No 159*

Reid Inquiry, 1997, *Submission No 168*

Reid Inquiry, 1997, *Submission No 62*

Reid Report, 1997, *Exhibit No 13*

Reid Report, 1997, *Exhibit No 165*

Reid Report, 1997, *Submission No 15*

Reid, Duncan, 1993, So What's New with the New Paradigm?, *St Mark's Review*, Summer, Canberra

Reiman, Jeffrey, 1990, *Justice and Modern Moral Philosophy*, Yale University Press, New Haven

Rengger, N J, 1995, *Political Theory, Modernity and Postmodernity*, Blackwell, Oxford

Reynolds, Peter C, 1981, *On the Evolution of Human Behavior: the argument from animals to man*, University of California Press, Berkeley

Richardson, J E, 1967, *Introduction to the Australian Trade Practices Act*, Hicks Smith, Sydney

Robbins, L, 1932, *An Essay on the Nature and Significance of Economic Science*, Macmillan, London

Robbins, L, 1978, *Theory of Economic Policy in English Classical Political Economy*, Macmillan, London

Rorty, Richard, 1979, *Philosophy and the Mirror of Nature*, Princeton University Press, Princeton

Rorty, Richard, 1980, *Philosophy and the Mirror of Nature*, Basil Blackwell, Oxford

Rorty, Richard, 1983, *Method and Morality*, in Haan et al, 1983

Ross, E A, 1901, *Social Control*, Macmillan, London

Rousseau, Jean-Jacques, 1975, *The Social Contract*, Penguin Books, London

Sahlins, M D, 1960, The Origin of Society, *Scientific American*, 203, No 3, September, pp77-86

Salmon J in *Brusewitz v Brown [1923]* NSWLR 1106, p109 cited by Brennan and Toohey JJ in *Louth v Diprose (1992)* 110 ALR 1, pp8-9

Samuels, 1980,Economics as Science and its relation to Policy: The Example of Free Trade, *Journal of Economic Issues*, 14, March

Samuels, Warren J, ed, 1990, *Economics as Discourse*, Kluser Academic Publishers, Boston

Schwartz, Barry, 1986, *The Battle for Human Nature, Science, Morality and Modern Life*, WW Norton & Company, New York

Seligman, Adam B, 1992, *The Idea of Civil Society*, Princeton University Press, Princeton, New York

Senge, Peter, 1992, *The Fifth Discipline*, Century Business, London

Senge, Peter, M, 1992, *The Fifth Discipline*, Random House, Milsons Point

Senior, Nassau, 1965, *An Outline of the Science of Political Economy*, Augustus M Kelly, New York

Simon, Herbert A, 1991, Organizations and Markets, *Journal of Economic Perspectives*, Vol 5, no 2, Spring, pp25-44

Simons, Robert G, 1995, Competing *Gospels, Public Theology and Economic Theory*, E J Dwyer, Alexandria,

Smelser, Neil J, and Richard Swedberg, 1994, The Sociological Perspective on the Economy, in *The Handbook of Economic Sociology*, Neil J Smelser and Richard Swedberg eds, Princeton University Press, Princeton, NJ, 1994

Smith, Adam, 1976, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Claredon Press, Oxford

Smith, Adam, 1976, *The Theory of Moral Sentiments*, Raphael and Macfie, Oxford

Spradley, James P and McCurdy, 1994, *Conformity & Conflict, Readings in Cultural Anthropology*, eighth edition, Davis W, Harper Collins College Publishers, New York

Stackhouse, Max L, 1999a, *Mutual Obligation as Covernantal Justice in a Global Era*, Paper delivered at A Colloquium on Hard Choices, John XXIII College, ANU, 29 September

Stackhouse, Max L, 1999b, *Public Theology in Global Perspective: A Reformed View*, first draft, Paper delivered at A Colloquium on Hard Choices, John XXIII College, ANU, 29 September 1999

Stark, Werner, 1962, *The Fundamental Forms of Social Thought*, Routhledge and Kegan Paul, London

Stark, Werner, 1976, *The Social Bond*, Vol I, Antecedents of the Social Bond, The Phylogeny of Sociability, Fordham University Press, New York,

Stark, Werner, 1978, *The Social Bond, An Investigation into the Bases of Law-abidingness*, Vol II, Antercedents of the Social Bond, The Ontogeny of Sociality, Fordham University Press, New York

Stark, Werner, 1983, *The Social Bond*, Vol IV, Safeguards of the Social Bond, Ethos and Religion, Fordham University Press, New York

Stott, Diane, 1997, Reith balancing on a legal fence, *Sydney Morning Herald*, 29 July

Sugden, Robert, 1998, *Normative Expectations*, in Ben-Ner and Putterman, 1998

Switzer, Peter, 1997, Levelling the playing field, *The Australian*, 1 October

Taperell, GQ, RB Vermeesch and D J Harland, 1978, *Trade Practices and Consumer Protection*, 2nd edn, Butterworths, Sydney

Tawney, R H, 1921, *The Acquisitive Society*, Harcourt Brace, New York

Tawney, R H, 1926, 1938, *Religion and the Rise of Capitalism*, Pelican Books

Tawney, R H, 1972, R H, *Religion and the Rise of Capitalism*, Harmondsworth

The Pharmacy Guild of Australia, 1997, Media Release, 27 May

Tillich, Paul,1963, *Systematic Theology*, Vol III, University of Chicago Press

Toulmin, Stephen, 1990, *Cosmopolis*, The Free Press, New York

Tracey, David, 1976 Chicago University Lectures, as reported by Edwin Byford, private communication

Tracey, David, 1996, *Blessed Rage for Order*, Seabury Press, New York

Trade Practices Act Review Committee (Swanson Committee), 1976, Report, August, AGPS, Canberra

Trade Practices Commission, 1989,*Trade Practices Discussion Paper*, TPC, Canberra

Trade Practices Commission, 1991, *Unconscionable Conduct and the Trade Practices Act*, Possible extension to cover commercial transactions, Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, Trade Practices Commission, Canberra

Trade Practices Consultative Committee, 1979, *Small business and the Trade Practices Act*, December, AGPS, Canberra

Veblen, T, 1961, *The Place of Science in Modern Civilisation*, Russell Sage, New York

Vickers, J, 1995, *Concepts of Competition*, Oxford Economic Papers 47

Viner, Jacob, 1978, *Religious Thought and Economic Society*, Jacques Melitz and Donald Winch, eds, Duke University press, Durham NC

Waldrop, Mitchell, 1992, *Complexity*, Viking, London

Walker, E Ronald, 1943, *From Economic Theory to Policy*, The University of Chicago Press, Chicago

Weber, Max, 1930, *The Protestant Ethic and the Spirit of Capitalism*, trans T Parsons, Unwin Paperbacks London

Weber, Max, 1949, *The Methodology of the Social Sciences*, trans E A Shils and H A Finch, The Free Press

Weber, Max, 1978, *Economy and Society*, University of California Press, Berkeley

White, Stephen K, 1991, *Political Theory and Postmodernism*, Cambridge University Press, Cambridge

Whitwell, Greg, 1986, *The Treasury Line*, Allen & Unwin, Sydney

Williamson, Oliver E, 1994, *Transaction Cost Economics and Organizational Theory*, in Neil J Smelser and Richard Swedberg, eds, *The Handbook of Economic Sociology*, Princeton University Press, Princeton , NJ

Williamson, Oliver E, 1996, *The Mechanisms of Governance*, Oxford University Press, New York

Winner, Langdon, 1977, *Autonomous Technology, Technics-out-of Control as a Theme in Political Thought*, The MIT Press, Cambridge

Working Party to the Minister for Small Business, Senator Schacht, 1995, Report on the Need to Amend Section 51AA, Department of Industry, Science and Technology, Canberra